No. 99-1235-CFX Title: Green Tree Financial Corp.-Alabama and Green Tree Financial Corporation, Petitioners
v.
Larketta Randolph

Docketed:
January 27, 2000 Court: United States Court of Appeals for the Eleventh Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Jan 21 2000 | Petition for writ of certiorari filed. (Response due February 26, 2000) |
| | Feb 28 2000 | Brief of respondent Larketta Randolph in opposition filed. |
| | Feb 28 2000 | Brief amici curiae of American Bankers Association, et al. filed. |
| | Mar 8 2000 | DISTRIBUTED for Conference of March 24, 2000 |
| | Mar 8 2000 | Reply brief of petitioners Green Tree Fin. Corp., et al. filed. |
| | Mar 27 2000 | REDISTRIBUTED for Conference of March 31, 2000 |
| | Apr 3 2000 | Petition GRANTED.<br>SET FOR ARGUMENT October 3, 2000.<br>********** |
| | Apr 11 2000 | Order extending time to file brief of petitioner on the merits until June 8, 2000. |
| | Apr 18 2000 | Order extending time to file respondent's brief on the merits to and including July 24, 2000. |
| | Jun 8 2000 | Joint appendix filed. |
| | Jun 8 2000 | Joint Lodging consisting of twenty copies of material. |
| | Jun 8 2000 | Brief of petitioners Green Tree Financial Corp., et al. filed. |
| | Jun 8 2000 | Brief amicus curiae of Alabama Manufactured Housing Institute filed. |
| | Jun 8 2000 | Brief amicus curiae of American Arbitration Association filed. |
| | Jun 8 2000 | Brief amicus curiae of Equal Employment Advisory Council filed. |
| | Jun 8 2000 | Brief amici curiae of American Bankers Association, et al. filed. |
| | Jun 8 2000 | Brief amicus curiae of Chamber of Commerce of United States of America filed. |
| | Jun 8 2000 | LODGING consisting of forty bound copies of miscellaneous documents submitted by counsel for amicus Chamber of Commerce |
| | Jun 8 2000 | Original certification of Brian Corey which was reroduced in the joint appendix received from counsel for the petitioner. |
| | Jun 8 2000 | Brief amicus curiae of National Arbitration Forum in support of neither party filed. |
| | Jul 19 2000 | Record filed. |
| | Jul 21 2000 | Motion of Terry Johnson, et al. for leave to file a brief as amici curiae filed. |
| | Jul 21 2000 | Brief amicus curiae of respondent Consumers Union of the U.S. filed. |
| | Jul 24 2000 | Brief amici curiae of Trial Lawyers for Public Justice, et al. filed. |

2 pp

No. 99-1235-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Jul 24 2000 | LODGING consisting of eleven bound copies of appendix material submitted by counsel for Trial Lawyers for Public Justice |
| | Jul 24 2000 | Brief amici curiae of AARP and National Consumer Law Center filed. |
| | Jul 24 2000 | Brief amicus curiae of Public Citizen filed. |
| | Jul 24 2000 | Brief of respondent Larketta Randolph filed. |
| | Jul 24 2000 | Brief amicus curiae of National Association of Consumer Advocates filed. |
| | Jul 26 2000 | CIRCULATED. |
| | Aug 24 2000 | Reply brief of petitioner Green Tree Financial Corp.-Alabama, et al. filed. |
| | Aug 28 2000 | Motion of Terry Johnson, et al. for leave to file a brief as amici curiae GRANTED. |
| | Sep 1 2000 | Supplemental brief of petitioners Green Tree Financial Corp. -Alabama, et al. filed. |
| | Oct 3 2000 | ARGUED. |

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 99——

IN THE
# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

January 21, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration" appealable under 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals erred in concluding that an arbitration provision that was "silent" on the issue of costs and fees was unenforceable under the Federal Arbitration Act because the risk that plaintiff "might" be required to bear unknown costs and fees potentially undermined her ability to vindicate statutory rights.

## STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that they are wholly owned subsidiaries of Conseco, Inc., an Indiana corporation whose stock is publicly traded. Petitioners further state that no publicly owned company owns ten percent or more of the stock of Conseco, Inc.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Green Tree Financial Corp.—Alabama and Green Tree Financial Corporation respectfully request that this Court grant their petition for certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is published at 178 F.3d 1149 (11th Cir. 1999) and appears in the Appendix to this Petition ("Pet. App.") at 1a-19a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 55a-56a. The district court's memorandum opinion and order is published at 991 F. Supp. 1410 (M.D. Ala. 1997) and appears at Pet. App. 20a-50a. The district court's order denying respondent's motion for reconsideration is published at 991 F. Supp. at 1425-26 and appears at Pet. App. 51a-54a.

## JURISDICTION

The court of appeals entered judgment on June 22, 1999, and denied a timely petition for rehearing on October 28, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, provides appellate jurisdiction for appeals from various categories of district court orders relating to arbitration. *Id.* § 16. Included among the category of appealable orders is "a final decision with respect to an arbitration." *Id.* § 16(a)(3).[1] Section 16 also provides that

[1] Section 16 originally was codified at 9 U.S.C. § 15, and was renumbered without change by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5089, 5120.

"an appeal may not be taken from an interlocutory order . . . directing arbitration to proceed . . . ." *Id.* § 16(b)(2). Finally, Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2.

## STATEMENT OF THE CASE

### *Statutory Background*

This case presents the issue of the proper construction of Section 16 of the 1988 Amendments to the FAA, 9 U.S.C. § 16. Prior to 1988, an arbitration decision that did not qualify for either injunctive appeal under 28 U.S.C. § 1292(a) or discretionary appeal under § 1292(b) was appealable only if it qualified as a "final decision" under 28 U.S.C. § 1291. To determine whether an order constituted a "final decision" under 28 U.S.C. § 1291, courts of appeals drew a distinction "between cases in which arbitration [wa]s the only claim for relief [*i.e.*, "independent" proceedings] and cases in which arbitration [wa]s raised in the midst of a proceeding for other relief [*i.e.*, "embedded" proceedings]." *Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992). Arbitration orders in "independent" proceedings were classified as "final decisions" appealable under 28 U.S.C. § 1291; arbitration orders in "embedded" proceedings were classified as interlocutory and could not be appealed under 28 U.S.C. § 1291. See, *e.g.*, *id.* at 784.

Against this background, Congress enacted Section 16 "to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration" (David R. Siegel, *Practice Commentary* to 9 U.S.C.A. § 16, at 495 (West 1999)) and to "promote appeals from orders barring abitration and limit appeals from orders directing arbitration," *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993).

That congressional purpose is reflected in the fact that Section 16 grants jurisdiction over anti-arbitration orders and denies appellate jurisdiction over orders favoring arbitration. Thus, Section 16 allows immediate appeals from orders "refusing a stay of any action [pending arbitration]," 9 U.S.C. § 16(a)(1)(A), denying a petition "to order arbitration to proceed," *id.* § 16(a)(1)(B), denying an application "to compel arbitration," *id.* § 16(a)(1)(C), "denying confirmation of an [arbitration] award or partial award," *id.* § 16(a)(1)(D), and "modifying, correcting, or vacating an award," *id.* § 16 (a)(1)(E). Similarly, Section 16 authorizes immediate appeal from "an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to [the FAA]," *id.* § 16(a)(2).

On the other hand, Section 16(b), which largely mirrors Section 16(a)(1), severely *limits* "interlocutory" appeals from pro-arbitration orders. *Id.* § 16(b). Thus, absent compliance with the discretionary requirements of 28 U.S.C. § 1292(b), a party is prohibited from appealing an interlocutory order "granting a stay of any action [pending arbitration]," *id.* § 16(b)(1), "directing arbitration to proceed," *id.* § 16(b)(2), "compelling arbitration," *id.* § 16(b)(3), or "refusing to enjoin an arbitration that is subject to [Title 9]," *id.* § 16(b)(4). Because these orders favor arbitration, Congress dictated that appellate review of them must await a "final decision" by the district court terminating the controversy following the completion of the arbitration. *Id.* § 16(a)(3).

***Factual Background***

On January 25, 1994, respondent Larketta Randolph ("Respondent") purchased a mobile home from Better Cents Home Builders Inc. ("Better Cents"). Pet. App. 2a. Respondent financed the purchase through Petitioner Green Tree Financial Corp.—Alabama, a wholly owned

subsidiary of Green Tree Financial Corporation (collectively, "Petitioners"). *Id.* The financing documents for the purchase required that respondent acquire " 'vendor's single interest' " insurance, which protects a vendor or lienholder against the costs associated with repossession of the property in the event of a loan default. *Id.* Respondent's retail installment contract with Better Cents identified petitioner Green Tree Financial Corp.—Alabama as the assignee and contains the arbitration provision at the center of this dispute. *Id.* at 2a-3a.

The arbitration provision provides that " '[a]ll disputes, claims, or controversies arising from or relating to this Contract or the relationships that result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with the consent of Buyer(s).' " Pet. App. 3a. Moreover, by entering into the contract, the parties acknowledged that " '[t]his arbitration Contract is made pursuant to a transaction in interstate commerce" that is "governed by the Federal Arbitration Act at 9 U.S.C. Section 1.' " *Id.* In addition, the arbitration provision provides:

> The parties agree and understand that all disputes arising under case law, *statutory law*, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that *the arbitrator shall have all powers provided by the law* and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

*Id.* at 57a (emphases added). The arbitration provision is reproduced in its entirety at Pet. App. 57a-58a.

In January 1996, respondent filed an action in the United States District Court for the Middle District of

Alabama, alleging that petitioners violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), by failing to include the requirement that respondent purchase vendor's single interest insurance in the TILA disclosure, and violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), by requiring arbitration of all statutory claims. Pet. App. 21a-22a. Respondent requested certification of a class action of all individuals that had entered into similar agreements with petitioners and sought monetary damages, including attorneys' fees and recovery of litigation expenses. *Id.* at 22a, 27a. In lieu of an answer, petitioners responded by filing a Motion to Stay Action and Compel Arbitration. *Id.*

In resolving that Motion to Stay, the district court did not address the merits of respondent's underlying claims but instead focused on whether respondent could be compelled to arbitrate those claims. Pet. App. 26a n.5. Because the contract satisfied the necessary interstate commerce nexus, the court ruled that the FAA applied. *Id.* at 23a n.4 (citing *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995)). The district court noted that by enacting the FAA, Congress "manifested a 'liberal federal policy favoring arbitration agreements,'" and sought "'to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts'" by "plac[ing] arbitration agreements upon the same footing as other contracts." *Id.* at 24a (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) and *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Further, the district court acknowledged that "'questions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration.'" *Id.* (emphasis added) (quoting *Moses H. Cone*, 460 U.S. at 24).

To resolve whether respondent could be compelled to arbitrate her statutory claims, the district court applied a settled two-part test that required determination of "[1] whether the Parties' agreement to arbitrate reaches the statutory issues, and . . . [2] whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims." Pet. App. 27a. *First*, the district court concluded that the arbitration provision encompassed respondent's statutory claims under TILA and the ECOA. *Id.* at 28a. Noting that, by its terms, the arbitration provision applied to " '[a]ll disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of th[e] arbitration clauses or the entire contract,' " and " 'that all disputes arising under case law, *statutory law*, and all other laws, including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract,' " the district court concluded that this language was "sufficiently broad to encompass [respondent's] TILA, [ECOA], and other claims." *Id.* (emphasis added).

*Second*, the district court explained that by agreeing to arbitrate a statutory claim " 'a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' " Pet. App. 29a (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Accordingly, the district court concluded that *respondent* bore the burden of showing that Congress intended to preclude a waiver of judicial remedies based on "either the text of the statute(s), their legislative histories, or from an inherent conflict between arbitration and the statutes' underlying purposes." *Id.* at 30a.

Because respondent did "not cite any provision of the text or legislative history of either the TILA or the [ECOA] that expressly preclude[d] waiver of judicial remedies," the district court considered whether there was evidence of a "conflict between arbitration and the statutes' underlying purpose." Pet. App. 30a. The district court explained that " 'the fact that [TILA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Id.* at 33a (quoting *Gilmer*, 500 U.S. at 32). Because respondent did not "cite any compelling evidence in support of her position," the district court concluded that she "failed to meet her burden of showing why the arbitration provision in her contract should not be enforced." *Id.* at 38a. Similarly, the district court rejected as "unpersuasive" respondent's argument that 15 U.S.C. § 1691(a)(3), which bars a creditor from extending credit conditioned on the release of potential claims for TILA violations that arose in the past, rendered the arbitration provision unenforceable. *Id.* at 34a-35a.[2]

Accordingly, the district court granted petitioners' motion to compel respondent to submit her claims "to binding arbitration pursuant to the arbitration provision in her contract." Pet. App. 49a. Acknowledging that it was authorized to stay the proceedings and compel arbitration, see 9 U.S.C. § 3, the district court instead concluded that dismissal was appropriate because all of respondent's claims were to be submitted to arbitration in accordance with the arbitration provision. Pet. App. 48a.

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[2] The district court also rejected respondent's arguments that (1) the arbitration provision was not "[e]nforceable for lack of mutuality of obligation," Pet. App. 40a, 42a, and (2) respondent did not "knowingly enter into an agreement to arbitrate," *id.* at 46a. Finally, the district court ruled that it was bound by circuit precedent to reject respondent's request to "certify a class" for arbitration. *Id.* at 48a.

On reconsideration, the district court adhered to its prior ruling, explaining that it would "gladly modify and/or vacate its [prior] Order," if circumstances warranted. Pet. App. 54a.

***Decision of the Court of Appeals***

The Eleventh Circuit reversed. Pet. App. 2a. *First*, the court of appeals addressed whether the district court's order was a " 'final decision with respect to an arbitration that is subject to [the FAA].' " *Id.* at 7a (quoting 9 U.S.C. § 16(a)(3)). On that issue, the court of appeals acknowledged that "a number of circuits" had drawn a distinction between " 'embedded' " proceedings in "which the arbitration issue arises as part of a broader action dealing with other issues," and " 'independent' " proceedings, in which "the motion to compel arbitration is the only issue before the court." *Id.* at 7a, 8a (emphasis in original omitted). The Eleventh Circuit recognized that these "circuits have held that orders compelling arbitration which arise in embedded proceedings must be treated as interlocutory and non-appealable, not as 'final decisions' under § 16(a)(3)." *Id.* at 7a.[3] Moreover, it explained that at least five courts of appeals that had adopted the embedded/independent framework for analyz-

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[3] Specifically, the court of appeals identified *eight* circuits in which orders compelling arbitration in "embedded" proceedings would be considered non-final for purposes of Section 16(a)(3). Pet. App. 7a-8a (citing *John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 275 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993)).

ing finality under Section 16(a)(3) had held that "a district court's order compelling arbitration in an embedded proceeding is interlocutory and non-appealable, even if the district court dismisses the remaining claims." *Id.* at 8a (emphasis in original omitted) (citing cases).

On the other hand, the Eleventh Circuit recognized that "the Sixth and Tenth Circuits" had adopted a different "approach to the question of whether an arbitration order is an appealable 'final decision' under § 16(a)(3)." Pet. App. 9a. In contrast to the majority rule, these two circuits treated orders dismissing cases in favor of arbitration as "final decisions" appealable under Section 16(a)(3). *Id.* (citing *Armijo* v. *Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995) and *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1276 (6th Cir. 1990)).[4]

Having identified "a circuit split on the question whether a district court's order compelling arbitration in an embedded proceeding is an appealable 'final decision' when it dismisses the remaining claims," the court of appeals explained that this was an issue "of first impression" in the Eleventh Circuit. Pet. App. 9a. In analyzing the term "final decision" under Section 16(a)(3), the court of appeals explained that it would "proceed from a different position than circuits such as the Seventh Circuit" that had accorded " 'talismanic significance' . . . to the distinction between independent and embedded proceedings." *Id.* at 10a (citation omitted) (quoting *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1211 (7th Cir. 1998). In doing so, the court of appeals acknowledged that its rejection of the independent/embedded framework was outcome determinative because, if it "followed the

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[4] The court of appeals also noted that this minority approach was supported by judges who had issued dissenting opinions in cases in the Seventh and Ninth Circuits. Pet. App. 9a (citing *Napleton*, 138 F.3d at 1214-15 (Wood, J., dissenting) and *McCarthy*, 122 F.3d at 1246-47 (Pregerson, J., dissenting)).

other circuits (save the Sixth and Tenth) and attached excessive significance to the 'embedded' versus 'independent' proceeding distinction," then it would "lack jurisdiction here." *Id.* at 11a.[5]

Rejecting what it characterized as a " 'myopic' " reliance on the "embedded/independent distinction," the Eleventh Circuit "decline[d]" to adopt the majority rule. Pet. App. 8a, 11a. Instead, it stated that the intent of Section 16 was to "clear away the deadwood" and to " 'furnish a clear rule for appealability of orders relating to arbitration proceedings.' " *Id.* at 12a. (quoting *Napleton*, 138 F.3d at 1217 (Wood, J., dissenting)). Ignoring the fact that the "embedded/independent" distinction provided just such a clear rule, the court of appeals looked instead to statements in the legislative history of Section 16 to conclude that an " '[a]ppeal can be taken from . . . a final judgment dismissing an action in deference to arbitration.' " *Id.* at 13a (quoting *Arnold*, 920 F.2d at 1274-75). Specifically, the court of appeals criticized the analysis by the majority of the other Circuits, *id.* at 14a, and held that the district court's "order compelling arbitration was an appealable 'final decision' under 9 U.S.C. § 16(a)(3)," *id.* at 15a.

*Second*, on the merits, the Eleventh Circuit considered whether the arbitration provision was unenforceable. While paying lip service to the " 'strong federal policy favoring arbitration' " and recognizing that "procedural apparatus of an arbitration 'should not make an arbitration clause unenforceable,' " Pet. App. 15a (quoting

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[5] The panel noted that the dismissal by the district court in this case was "with prejudice," Pet. App. 14a, and that was a "feature" not present "in most" cases "relying on the embedded/independent distinction." *Id.* Of course, the cases applying the majority view "did not clearly state the nature of the dismissal," *id.*, because that factor has no bearing on the bright-line test that they had adopted to determine whether an order compelling arbitration was a "final decision" under Section 16(a)(3).

*Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998)), the court of appeals ignored these principles in ruling that the arbitration provision was unenforceable because it "fail[ed] to provide the minimum guarantees required to ensure that [respondent's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." *Id.* at 18a.

In doing so, the court of appeals failed to identify any provision of TILA that would be frustrated by arbitration of respondent's claims. Nor could the court of appeals identify any evidence that arbitration of respondent's statutory claims would result in the imposition of substantial arbitration costs or that she would bear those costs. Indeed, the Eleventh Circuit ignored the fact that the arbitration provision expressly provided that the arbitrator would have "all powers provided by the law." Pet. App. 57a. Instead, it relied upon the *absence* of any record evidence on these issues to rule that the arbitration provision "raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum." *Id.* at 17a. While it acknowledged that (1) the arbitration "clause is silent on the subject of arbitration fees and costs," *id.* at 19a, and (2) that there was *no* evidence regarding the amount or apportionment of those costs, the Eleventh Circuit nevertheless resolved that failure of proof *against* arbitration by speculating that respondent "*might* be required to bear substantial costs of the arbitration even if she were to prevail." *Id.* (emphasis added).

Petitioners, joined by *amici curiae*, sought rehearing of the court of appeals' decision because, if allowed to stand, it could jeopardize thousands, if not millions of arbitration agreements that do not specifically identify the costs associated with arbitration or provide that the claimant

will not bear the costs of pursuing arbitration. The court of appeals denied the petition for rehearing. Pet. App. 55a-56a.

## REASONS FOR GRANTING THE PETITION

Further review of the decision of the Eleventh Circuit is necessary in this case to ensure the proper and uniform resolution of a recurring and important issue of appellate jurisdiction that has sharply divided the courts of appeals. Specifically, the case squarely presents the issue whether, under Section 16(a)(3) of the FAA, a court of appeals has jurisdiction over an appeal from a district court order dismissing a case so that it may be resolved through arbitration in accordance with the agreement of the parties.

The clear majority of circuit courts answer no, (see note 3, *supra*), resolving this issue by analyzing the nature of the underlying action to determine whether an order compelling arbitration is truly a "final decision" under Section 16(a)(3). Where the underlying action seeks only a determination regarding arbitrability—*i.e.*, an independent proceeding—an order compelling arbitration is "final" and immediate appeal is authorized under Section 16(a)(3). Where the underlying action seeks relief other than an order requiring or prohibiting arbitration—*i.e.*, an embedded proceeding—an order compelling arbitration is non-final and cannot be appealed immediately under Section 16(a)(3). The majority rule provides a bright-line, workable standard that implements the language of Section 16 and furthers the strong federal policy favoring arbitration that Section 16 was designed to foster.

While recognizing that the vast majority of circuit courts had adopted this standard, the Eleventh Circuit in this case expressly rejected it in favor of the minority approach adhered to by two other courts of appeals. See *Armijo* v. *Prudential Ins. Co.*, 72 F.3d 793, 797, 799 (10th Cir. 1995); *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1275-76 (6th Cir. 1990). These courts of appeals

reject the "independent/embedded" framework and instead employ a case-by-case analysis developed largely on the basis of their review of statements culled from the legislative history of Section 16. Specifically, the minority approach looks to the label affixed by the district court to an order compelling arbitration as the means for determining whether such order constitutes a "final decision" immediately appealable under Section 16(a)(3). This minority approach undermines the express purpose of the FAA by forcing parties to appeal when there is doubt, thereby causing delay and increasing the costs of the arbitration process even when a district court has concluded that claims brought in a lawsuit should, in accordance with the parties' agreement, be resolved in an arbitration.

The Court should grant certiorari to resolve this dispute and adopt the majority view that dismissals in favor of arbitration are not appealable where the relief sought in the district court is broader than a determination whether a controversy is subject to arbitration. This case squarely presents that controversy. Indeed, the Eleventh Circuit correctly acknowledged that if it "followed the other circuits (save the Sixth and Tenth)," then it would, contrary to its ultimate conclusion, "lack jurisdiction here." Pet. App. 11a. In short, this case presents a recurring issue of paramount importance to the congressional scheme governing arbitration under the FAA that has generated substantial conflicts among the courts of appeals.

Even if the court of appeals had jurisdiction to review the district court's order compelling arbitration, the Eleventh Circuit's analysis and holding that the arbitration provision was unenforceable independently calls for plenary review by this Court. While recognizing that the arbitration provision was "silent" on issues such as the filing fees, arbitrators' fees and other "costs of arbitration," the court of appeals' approach adopted a presumption *against*

arbitration and imposed the burden of proof on petitioners to establish that arbitration would not undermine respondent's ability to vindicate her statutory rights. That approach conflicts with clear rulings by this Court and decisions of the courts of appeals that properly interpret such provisions in light of the strong federal policy favoring arbitration and impose the burden of proving unenforceability on the party seeking to avoid arbitration.

If left unreviewed, the decision below would have a dramatic effect on the ability of parties to order their affairs by adopting arbitration as their chosen means to resolve potential disputes. Under the Eleventh Circuit's analysis, an arbitration agreement must anticipate and expressly address in a comprehensive manner all of the potential costs and procedural issues associated with arbitration lest an omission be construed *against* arbitration, rendering the agreement to arbitrate unenforceable.

## I. THE CASE SQUARELY PRESENTS AN IMPORTANT ISSUE REGARDING THE SCOPE OF APPELLATE JURISDICTION OF ORDERS DISMISSING CASES IN FAVOR OF ARBITRATION UNDER THE FEDERAL ARBITRATION ACT THAT HAS SHARPLY DIVIDED THE COURTS OF APPEALS.

The decision of the court of appeals deepens an already mature conflict among the Circuits on the recurring issue of whether an order compelling arbitration in "embedded proceedings" is a "final decision with respect to an arbitration" subject to immediate review under 9 U.S.C. § 16(a)(3). As acknowledged by the court of appeals in this case, the decision below is flatly inconsistent with holdings by five other courts of appeals and conflicts with the reasoning of at least three others. Pet. App. 7a-9a. By contrast, the legal standard adopted below is supported by that of two other courts of appeals. Further review by this Court is plainly warranted to provide uniformity on a fundamental issue involving the FAA.

a. On one side of this legal divide are courts of appeals that distinguish between "independent" and "embedded" proceedings as the means for determining whether a district court order compelling arbitration is "a final decision with respect to an arbitration that is subject to [Title 9]." 9 U.S.C. § 16(a). These courts have held that an order compelling arbitration in an embedded proceeding *cannot* be appealed immediately, regardless of whether the district court enters a stay or dismisses the case in its entirety.

In *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998), the First Circuit dismissed for want of jurisdiction an appeal by an auto dealership from an order compelling arbitration and dismissing the case with costs. *Id.* at 627. Recognizing that "other circuits have been divided on the issue," *id.* at 628, the *Seacoast* Court sided with the "circuits [that] have focused on the distinction between embedded and independent proceedings to determine whether jurisdiction exists over an appeal from a dismissal of an order favoring arbitration," *id.* Expressly rejecting the analysis of several other courts of appeals, *id.*, and adopting the analysis of the Ninth, Eighth, Seventh, Fifth, and Fourth Circuits, *id.* at 628-29, the *Seacoast* Court held that it lacked jurisdiction under Section 16(a)(3) to review whether an order compelling arbitration was proper and explained that its analysis "avoid[ed] elevating form over substance and promote[d] both the pro-arbitration purposes of the FAA and the institutional goal of avoiding piecemeal appeals and systemic delays." *Id.* at 629.

The ruling in *Seacoast* built directly on the Seventh Circuit's decision in *Napleton* v. *General Motors Corp.*, 138 F.3d 1209 (7th Cir. 1998). There, the court of appeals considered whether the dismissal of an embedded case " 'to allow for arbitration' constitutes an appealable —i.e. final—decision." *Id.* at 1212. Noting that other

circuits had addressed similar questions without reaching "unanimity in their answers," *id.*, the Seventh Circuit explained that "the *jurisdictional lodestar* of appealability is whether the decision favoring arbitration is from an independent or from an embedded proceeding," *id.* (emphasis added). The Seventh Circuit held that "it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration." *Id.* In contrast, adoption of the contrary rule, would render determinative "whether the district judge dismissed rather than stayed an action," thereby permitting the district court to manipulate whether a "party seeking to avoid arbitration could appeal immediately," an arbitrary result that Congress could not have intended. *Id.* at 1213. Accordingly, the *Napleton* court concluded that it would have "jurisdiction over appeals from independent proceedings" and would "decline to find jurisdiction over appeals from embedded proceedings." *Id.* at 1212.[6]

Similarly, in *McCarthy* v. *Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997), the Ninth Circuit considered an appeal from an order requiring plaintiffs to arbitrate their claims under the TILA and dismissing the underlying action. *Id.* at 1243. Applying the bright-line embedded/independent "analysis" that had "been followed by the majority of courts," the *McCarthy* Court concluded that the order compelling arbitration arose in an embedded proceeding and therefore was not a "final decision" under 9 U.S.C. § 16(a)(3). *Id.* at 1244 (identifying conflicting analysis by Tenth and Sixth Circuits). Relying on precedent from the Eighth Circuit, the *McCarthy* Court

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[6] *Accord Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 786 (7th Cir. 1992) (holding that order compelling arbitration and entering judgment under Rule 54(b) was not a final decision under Section 16(a)(3)).

rejected a separate test for cases where the district court ordered dismissal, rather than a stay, of the judicial proceeding because that distinction would "ignor[e] the clear dictates of the FAA" and would contravene the intent of Congress. *Id.* at 1245.

In *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994), the Eighth Circuit dismissed an appeal from the district court's decision ordering the parties to proceed to arbitration to resolve allegations arising under the TILA and dismissing plaintiffs' class action allegations. *Id.* at 94. Relying on "a number of well-reasoned decisions handed down" by other courts of appeals, the Eighth Circuit agreed that in enacting Section 16, "Congress simply 'built upon the distinction the courts had previously recognized between so-called "independent" proceedings and so-called "embedded" proceedings.' " *Id.* at 95 (quoting *Filanto*, 984 F.2d at 60) (noting that Sixth Circuit adopted conflicting analysis). The *Gammaro* court explained that this "bright-line rule" was a "product of Congress's purpose" which would be undermined if the court of appeals adopted "a more attenuated, case-by-case determination of jurisdiction." *Id.* at 96 (citing *Humphrey* v. *Prudential Sec. Inc.*, 4 F.3d 313, 318 (4th Cir. 1993)). Indeed, warning that it would "brook no delay in requiring compliance with orders compelling arbitration," the Eighth Circuit made clear that "[f]uture appeals from such orders in embedded proceedings will be subject to dismissal without opinion, sua sponte if necessary." *Id.*

Finally, in *Humphrey* v. *Prudential Securities Inc.*, 4 F.3d 313 (4th Cir. 1993), the Fourth Circuit dismissed for lack of jurisdiction an appeal of a decision ordering arbitration of all the substantive claims raised in a complaint. *Id.* at 314, 319. There, the district court "retained jurisdiction through its stay only to enforce or vacate a forthcoming arbitration award." *Id.* at 317. As

a result, the Court was required to address "whether an embedded action may give rise to a final decision subject to section 16(a)(3) review when all the claims in which the arbitration issue is embedded are disposed of." *Id.* at 318. Concluding that Congress intended courts to rely upon " 'preexisting judicial interpretation' " to define the term " 'final decision,' " the Fourth Circuit ruled that " 'arbitration orders [are] final if arbitration is the sole issue before the court and interlocutory if raised in an embedded proceeding.' " *Id.* (alteration in original) (quoting *Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 784, 785 (7th Cir. 1992)). Accordingly, the *Humphrey* Court held "that an embedded proceeding may not give rise to a final decision subject to section 16(a)(3) review." *Id.*[7]

Taken together, these cases establish that the clear majority of the courts of appeals have adopted the embedded/independent framework as the "jurisdictional lodestar of appealability." *Napleton*, 138 F.3d at 1212. Accordingly, the order in this case compelling arbitration in an embedded proceeding could not give rise to a "final decision" under section 16(a)(3) in those Circuits and thus the arbitration proceeding would have had to run its course before the courts could intervene. By the happenstance of geography, that majority rule was not followed by the court below.

b. On the opposite side of this debate are decisions by the Sixth and Tenth Circuits and the decision by the

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[7] *See also John Hancock Mut. Life Ins.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998) (adopting embedded/independent analysis to assess whether order constitutes final decision appealable under 9 U.S.C. § 16(a)(3)); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) ("[T]here can never be an interlocutory appeal from an embedded proceeding"); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993) (holding that orders directing arbitration in embedded proceedings "are not immediately appealable").

Eleventh Circuit in this case, each of which has exercised jurisdiction under 9 U.S.C. § 16(a)(3) to review arbitration orders in embedded proceedings.

The earliest of these cases was *Arnold* v. *Arnold Corp.*, 920 F.3d 1269 (6th Cir. 1990), where the Sixth Circuit considered an appeal from an order compelling arbitration and dismissing plaintiff's claims under the Securities and Exchange Act of 1934. *Id.* at 1272, 1273. Relying on snippets culled from the legislative history, the Sixth Circuit concluded, in a circular fashion, that "a final order [under section 16] is one which dismisses 'an action in deference to arbitration' and enters a final judgment." *Id.* at 1275 (quoting Committee on the Judiciary, Section by Section Analysis on S1482, 134 Cong. Rec. S16,284 (daily ed. Oct. 14, 1988)). The Sixth Circuit argued that by enacting Section 16, Congress "reject[ed] the prior distinction made between orders brought solely to compel specific performance of an agreement to arbitrate and orders granting or denying requests to compel arbitration entered into . . . in an ongoing action for legal relief on the underlying claims." *Id.* at 1276. See also *Security Watch, Inc.* v. *Sentinel Sys., Inc.*, 176 F.3d 369, 371 (6th Cir. 1999) (relying on *Arnold* to conclude that "an order dismissing an action in favor of arbitration is a final order appealable under § 16(a)(3)"), *petition for cert. filed*, 68 USLW 3291 (U.S. Oct. 18, 1999) (99-669).

Similarly, in *Armijo* v. *Prudential Insurance Co.*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit held that it had jurisdiction to review the district court's decision compelling arbitration of plaintiffs' federal and state discrimination claims and dismissing plaintiff's lawsuit. *Id.* at 797. The Tenth Circuit drew a distinction between orders compelling arbitration in which the lawsuit was stayed—which were "non-final"—and orders compelling arbitration and dismissing the proceedings—which were

"final order[s]" for which 9 U.S.C. § 16(a)(3) expressly provided immediate appeal. *Id.* Because the district court's decision ordering arbitration also dismissed the case—rather than entering a stay—the Tenth Circuit concluded that it was a "final order" expressly appealable under 9 U.S.C. § 16(a)(3). *Id.*

Finally, in this case, the Eleventh Circuit acknowledged the conflict among the courts of appeals, recognized that the case before it implicated that conflict, and embraced the minority position that an order compelling arbitration and dismissing the case is a "final decision" for which an immediate appeal lies under 9 U.S.C. § 16(a)(3). *First,* the Eleventh Circuit identified the deep conflict among the courts of appeals on the question "whether a district court's order compelling arbitration in an embedded proceeding is an appealable 'final decision' where it dismisses the remaining claims." Pet. App. 9a. *Second,* the court of appeals acknowledged that this case implicated that conflict because, if it followed "the other circuits (save the Sixth and the Tenth)," then it would "lack jurisdiction here." *Id.* at 11a. *Third,* the court of appeals placed itself firmly in the camp with the Sixth and Tenth Circuits by rejecting reliance on the "embedded/independent" framework and adopting instead a case-by-case approach where "appeals should be available where there is nothing left to be done in the district court." *Id.* at 13a.

c. As demonstrated above, the issue whether an order dismissing a case in favor of arbitration is a "final decision" under 9 U.S.C. § 16(a)(3) has generated a deep and persistent conflict among the courts of appeals. Courts on both sides of this debate have acknowledged the existence of the conflict and criticized the approach taken by the other side. See, *e.g.*, *Seacoast*, 143 F.3d at 628 ("[O]ther circuits have been divided on this issue."); Pet. App. 9a ("We are thus faced with a circuit split on the question whether a district court's order

compelling arbitration in an embedded proceeding is an appealable 'final decision' where it dismisses the remaining claims."). Under the majority view, it is clear that the Eleventh Circuit would have lacked jurisdiction to review the district court's order because this case indisputably is an embedded proceeding in which the arbitration issue arose in the midst of claims for other relief. See, *e.g.*, *Perera*, 951 F.2d at 784 (defining "embedded" proceeding); *Filanto S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993) (same). Accordingly, this case presents an ideal vehicle for resolving the dispute regarding the proper analysis for determining whether an order is a final decision under Section 16(a)(3) of the FAA.

Moreover, this issue is a matter of considerable importance to the statutory scheme governing arbitration adopted by Congress in 1988. Courts on both sides of the conflict acknowledge that the 1988 amendments sought to promote arbitration by delaying the review of decisions in favor of arbitration until *after* the arbitration had taken place. See, *e.g.*, *Arnold*, 920 F.2d at 1274 (noting that under section 16, "interlocutory orders directing the parties to arbitration are not appealable"); *Filanto*, 984 F.2d at 60 (Congress "endeavored to promote appeals from orders barring arbitration and limit appeals from orders directing arbitration"). Absent corrective action by this Court, however, that legislative policy favoring arbitration over litigation will be frustrated by the circuits applying the minority rule. In those circuits, orders dismissing an action in favor of arbitration may result in lengthy appeals that will result in unnecessary delay and expense associated with the appellate process even before an arbitration has begun. See, *e.g.*, *Napleton*, 138 F.3d at 1214 ("the most economical approach is not to allow an intermission for appellate review, but rather for the parties to proceed expeditiously to arbitration"). That

result cannot be reconciled with the language of 16(a)(3), which permits an appeal only from "a final decision with respect to an arbitration" or with the strong federal policy favoring arbitration over litigation.

Finally, the minority approach adopted by the Sixth, Tenth and Eleventh Circuits allows district courts to manipulate the jurisdiction of an appellate court based solely on the label they choose to affix to orders compelling arbitration, an absurd result that Congress simply could not have intended. See, *e.g.*, *id.* at 1213 (identifying instance where district court entered Rule 54(b) judgment because it "seemingly wanted the appellate court to extend jurisdiction over [the] appeal"). As the court of appeals in *McCarthy* explained when it rejected the minority approach:

> [D]istinguishing between stays and dismissal for purposes of appellate review would condition the result on the district court's decision. If the circumstances compelled the court to stay the action, the case would proceed to an arbitrator; if the court dismissed all claims the case could be appealed immediately. We do not believe that Congress intended this arbitrary result when it barred appellate review of interlocutory orders compelling arbitration. We interpret the bar on appellate review to be just that, regardless of the terminology used by the trial court.

122 F.3d at 1245; see also *Napleton*, 138 F.3d at 1213 (refusing to "elevate the form of a district court's order over its substance"); *Seacoast*, 143 F.3d at 629 (same).

In short, this case squarely presents an issue that has generated an acknowledged conflict among the courts of appeals on an important and recurring issue of federal jurisdiction. Further review by this Court is accordingly warranted.

## II. THE COURT OF APPEALS' DECISION THAT THE ARBITRATION CLAUSE WAS UNENFORCEABLE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS GENERATED A CONFLICT AMONG THE COURTS OF APPEALS

Even if the panel had jurisdiction to reach the merits prior to the arbitration, it resolved the challenge to the enforceability of the arbitration provision in a manner that, if left unreviewed, would have a profound effect on the ability of parties to choose arbitration instead of litigation as the means by which they wish to resolve their disputes. Under the court of appeals' decision, arbitration provisions that are "silent" as to the costs of arbitration or as to the manner in which those costs wil be allocated among the parties would be unenforceable because those costs "might" be substantial and the claimant "might" be required to bear them. That conclusion contravenes the strong federal interest favoring arbitration expressed in decisions by this Court and conflicts with decisions by the courts of appeals.

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." 9 U.S.C. § 2. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court explained that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements," *id.* at 24, and therefore, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability," *id.* at 24-25; *accord Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Moreover, the "duty to enforce arbitra-

tion agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); see also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (same). Indeed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited development of arbitration as an alternative means of dispute resolution. *Id.* at 626-27. Accordingly, "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232. In fact, review of arbitration awards, though limited, "is sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.* To be sure, while the FAA's mandate in favor of arbitration agreements "may be overridden by a contrary congressional command," the "burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory right at issue." *Id.* at 226-27.

Here, however, the panel trampled on these settled standards in its rush to invalidate the arbitration provision. By contrast, the enforceability of the arbitration provision involved in this case has been upheld by the Alabama Supreme Court on numerous occasions. *Green Tree Financial Corp.* v. *Vintson*, No. 1972191, 1999 WL 778496, at *6 (Ala. Oct. 1, 1999); *Green Tree Financial Corp.* v. *Wampler*, Nos. 1970983, 191029, 1999 WL 667292, at *8 (Ala. Aug. 27, 1999); *Ex Parte Smith*, 736 So. 2d 604, 612-13 (Ala. 1999); *Patrick Home Ctr. Inc.* v. *Karr*, 730 So. 2d 1171, 1174 (Ala. 1999); *Ex Parte Parker*, 730 So. 2d 168, 172 (Ala. 1999); *Green Tree Financial Corp.* v. *Davis*, 729 So. 2d 329, 329 (Ala. 1999); *Ex Parte Napier*, 723 So. 2d 49, 54 (Ala. 1998); *Green Tree Agency, Inc.* v. *White*, 719 So. 2d 1179, 1180 (Ala. 1998); *Ex Parte Gates*, 675 So. 2d 371, 375

(Ala. 1996).[8] Indeed, in *Wampler*, the Alabama Supreme Court rejected the analysis of the Eleventh Circuit in this case and instead held that "[w]here a . . . contract is silent on a particular question," a reviewing court must not "indulg[e] an assumption that the proof would support a 'worst case' scenario." 1999 WL 667292, at *6. Indeed, the Third Circuit has expressly upheld the Green Tree arbitration provision against a challenge that it was unconscionable. *Harris* v. *Green Tree Financial Corp.*, 183 F.3d 173, 182-84 (3d Cir. 1999).

Not only is the enforceability of this specific provision a matter of conflict among the lower courts, but the Eleventh Circuit's fundamental approach to enforceability is flatly at odds with decisions of other courts of appeals and with the strong federal policy favoring arbitration. *First*, the panel disregarded the obligation to resolve doubts regarding arbitrability in accordance with the " 'the federal policy favoring arbitration.' " *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone*, 460 U.S. at 24). Instead, the panel resolved doubts *against* arbitration by assuming the worst possible outcome. That analysis conflicts with the Eighth Circuit's decision in *Dobbins* v. *Hawk's Enterprises*, No. 99-1582, 1999 WL 1256184 (8th Cir. Dec. 23, 1999) and the District of Columbia Circuit's decision in *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

In *Dobbins*, plaintiffs filed suit claiming damages based on alleged statutory violations of TILA. Defendant sought to compel arbitration. After initially compelling

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[8] Further, this arbitration clause has been scrutinized and upheld by other federal and state courts throughout the country. *See, e.g., Dorsey* v. *H.C.P.S. Sales, Inc.*, 46 F. Supp. 2d 804, 806-08 (N.D. Ill. 1999); *In re Pate*, 198 B.R. 841, 844-46 (Bankr. S.D. Ga. 1996); *Lackey* v. *Green Tree Financial Corp.*, 498 S.E.2d 898, 902-05 (S.C. Ct. App. 1998); *Pierman* v. *Green Tree Financial Servicing Corp.*, 933 P.2d 955, 956-57 (Okla. Ct. App. 1997).

arbitration, the district court ultimately ruled that the arbitration provision was unenforceable because the "final fee determination" of $23,000 precluded the Dobbinses "from availing themselves of the arbitral forum." *Id.* at *1. The Eighth Circuit reversed. It held that the Dobbinses were required "to fully explore" whether they could reduce the fees by seeking a waiver or by making a "more realistic demand for damages." *Id.* at *2 & n.3. Moreover, even if these avenues proved to be fruitless and failed to reduce the arbitration fee to a reasonable amount, the court of appeals directed the district court to "accept appellant's offer to pay the arbitration fees." *Id.* at *6 (footnote omitted).

Similarly, in *Cole*, the court of appeals considered an arbitration agreement that was "silent" on the issue of who would bear the costs of arbitration. 105 F.3d at 1485. Unlike the Eleventh Circuit, however, the *Cole* Court concluded that "the arbitration agreement . . . [was] valid and enforceable" because it interpreted the agreement to require the employer "to pay all arbitrators' fees in connection with the resolution of [the employee's statutory] claims." *Id.* at 1485, 1486. In doing so, the District of Columbia Circuit explained that it adopted that interpretation "to uphold the validity of the parties' contract." *Id.* at 1486.

*Second*, the Eleventh Circuit aggravated its error by improperly imposing upon petitioners the burden of disproving the parade of horribles imagined by the court. For example, when petitioners informed the panel that "the arbitrator may apportion the fees of the arbitration in his award," the panel responded that petitioners' failed to "guarantee that a consumer successfully arbitrating under [the arbitration clause] will not be saddled with a prohibitive costs order." Pet. App. 18a. When petitioners informed the panel that "no filing fees are required," the

panel responded that "whether there are fees is likely to depend on who conducts the arbitration, something the arbitration clause is silent about." *Id.*

That analysis conflicts with the Seventh Circuit's decision in *Koveleskie* v. *SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999) and the First Circuit's decision in *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999). In those cases, plaintiffs argued that an arbitration agreement was unenforceable in the context of claims arising under Title VII because the industry arbitrators "routinely fail to follow Title VII's fee-shifting principle by refusing to award statutory attorneys' fees to prevailing plaintiffs and by charging plaintiffs expensive forum fees." *Koveleskie*, 167 F.3d at 366; *Rosenberg*, 170 F.3d at 15. In rejecting that claim, the Seventh and First Circuits explained that the record failed to establish that "a plaintiff is asked to bear forum fees." *Koveleskie*, 167 F.3d at 366 (internal quotation marks omitted); *accord Rosenberg*, 170 F.3d at 15.

The panel below sought to distinguish *Rosenberg*, but in doing so highlighted that it had shifted the burden of proof to petitioners. Specifically, the panel below stated that

> the court in *Rosenberg* had before it a record suggesting that most successful arbitral claimants were awarded fees and costs; we lack similar information about how claimants fare under Green Tree's arbitration clause.

Pet. App. 18a-19a. But in *Rosenberg*, the party seeking to invalidate the arbitration attempted to satisfy her burden of proof by "plac[ing] in the record" evidence of "thirty-three arbitration cases." 170 F.3d at 16. The record developed by Rosenberg, however, simply did not support the conclusion about the alleged misconduct of

arbitrators because "only one plaintiff who prevailed on statutory grounds was denied fees and costs." *Id.*

In this case, as in *Rosenberg* and *Koveleskie*, the record evidence did not support the conclusion that the arbitrators would violate governing federal statutes and require respondent to "bear substantial costs of the arbitration even if she were to prevail." Pet. App. 19a. Nevertheless, the panel concluded that this absence of record evidence provided a basis for invalidating the arbitration provision. In doing so, the Eleventh Circuit shifted the burden of proof onto petitioners in contravention of well-established precedent. *McMahon*, 482 U.S. at 227 ("The burden is on the party opposing arbitration . . . ."). Indeed, because there was *no* evidence in the record supporting the conclusion that the arbitrator would disregard the law, the panel decision further violated settled precedent because it assumed, without any legitimate basis, that the arbitrator would disregard the statutory requirements of TILA. *McMahon*, 482 U.S. at 232 ("[T]here is no reason to assume at the outset that arbitrators will not follow the law. . . .").[9]

In sum, the Eleventh Circuit's decision violates well-settled principles that require a reviewing court to resolve doubts about the arbitrability of statutory claims in *favor* of arbitration and to impose the burden of proving that an arbitration provision is unenforceable squarely on the party *opposing* the arbitration. Here, the Eleventh Cir-

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[9] Moreover, in contrast to the decision below, the First and Seventh Circuits ruled that even if an arbitrator might impose, in a particular case, unreasonable costs in violation of federal statutory rights, that result "could be presented by the [claimant] to the reviewing court" *after* the arbitration under section 10 of the FAA. *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (citing *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997)); *accord Koveleskie* v. *SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

cuit, resolved any and all doubts *against* arbitration and imposed the burden of proof squarely—and improperly—on the party *seeking* arbitration of the underlying statutory claims. The decision below conflicts with numerous appellate decisions and sets a dangerous precedent that, if left uncorrected, would sow substantial confusion in an area of law where settled and clear standards are of paramount importance. The error is doubly disturbing because it is the product of an equally fundamental error by the court below in exercising appellate jurisdiction. Because the holding below raises two fundamental questions arising out of the proper enforcement of the FAA, this Court should grant review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

January 21, 2000

* Counsel of Record

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 98-6055

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LARKETTA RANDOLPH, on behalf of herself and all others similarly situated,
*Plaintiff-Appellant,*

v.

GREEN TREE FINANCIAL CORP.—ALABAMA; and GREEN TREE FINANCIAL CORPORATION,
*Defendants-Appellees.*

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Appeal from the United States District Court for the Middle District of Alabama

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June 22, 1999

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Before HATCHETT and CARNES, Circuit Judges, and FARRIS *, Senior Circuit Judge.**

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

** This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. § 46(d).

CARNES, Circuit Judge:

Plaintiff Larketta Randolph appeals the district court's order compelling arbitration of her claim against defendants Green Tree Financial Corporation and Green Tree Financial Corp.—Alabama (collectively, "Green Tree"), which financed her purchase of a mobile home. She alleges that Green Tree's financing documents violate the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), that its mandatory arbitration requirement violates the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("Equal Credit Act"), and that the TILA precludes the arbitration of disputes arising under that legislation. The district court ordered the parties to proceed to arbitration and dismissed the action with prejudice. Green Tree challenges our jurisdiction to hear this appeal. We conclude that the district court's judgment was an appealable "final decision." We also hold that the arbitration agreement in this case defeats the remedial purposes of the TILA and is unenforceable.

## I. BACKGROUND

This case stems from Randolph's January 25, 1994, purchase of a mobile home from Better Cents Home Builders, Inc., in Opelika, Alabama. Randolph financed her purchase through Green Tree Financial Corp.—Alabama, a wholly-owned subsidiary of Green Tree Financial Corporation. Randolph contends that Green Tree required her to obtain "vendor's single interest" insurance, which protects a vendor or lienholder against the costs of repossession in the event of default, but did not mention this requirement in its Truth in Lending Act disclosure.

Randolph's retail installment contract with Better Cents, which names Green Tree Financial Corp. as the assignee,

contains an arbitration provision. It reads, in pertinent part:

> 17. ARBITRATION: All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract . . . [including] money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, Assignee retains an option to use judicial or nonjudicial relief to enforce

> a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. . . . The initiation and maintenance of an action for judicial relief in a court [on the foregoing terms] shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision.

Randolph brought this suit in district court in January, 1996, alleging that Green Tree [1] violated the TILA by failing to include the requirement of vendor's single interest insurance in its TILA disclosure, and violated the Equal Credit Act by requiring arbitration of all claims.[2] She sought certification of a class of individuals who had entered into similar agreements with Green Tree. In response, Green Tree moved to compel Randolph to arbitrate her complaint pursuant to the arbitration agreement. It also moved to stay the action pending arbitration or, in the alternative, to dismiss it.

The district court granted the motion to compel arbitration, and declined to certify a class. *See Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1424-25 (M.D.Ala. 1997). Because it concluded that all the issues raised in Randolph's complaint must be submitted to arbi-

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[1] Her suit also named as a defendant Green Tree Financial Servicing Corporation. The district court dismissed this party from the action.

[2] In her initial complaint, Randolph also alleged fraud in the inducement of the arbitration agreement, but she omitted that claim in her amended complaint. It was deemed waived by the district court, and Randolph does not raise it on appeal.

tration, it denied the motion to stay the action and instead dismissed her claims with prejudice. *See id.* Randolph filed this appeal. Green Tree subsequently moved to dismiss the appeal for lack of jurisdiction.

## II. STANDARD OF REVIEW

The jurisdictional issue is a question of law, which we review *de novo. See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir.1998). We review *de novo* the district court's order compelling arbitration. *See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756 (11th Cir.1993).

## III. ANALYSIS

### A. WHETHER THE DISTRICT COURT'S ORDER WAS APPEALABLE AS A "FINAL DECISION" UNDER THE FEDERAL ARBITRATION ACT

As a threshold matter, we decide whether we have jurisdiction over this appeal. Though we would normally look to 28 U.S.C. § 1291 to determine our jurisdiction over the dismissal of this action, "Congress has set forth special rules governing appeals from a district court's arbitration order." *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir.1997). Those rules are set forth in section 16 of the Federal Arbitration Act, 9 U.S.C. § 16. That provision states:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16. Put succinctly, the provision "identifies two broad classes of cases in which an appeal is possible, and one in which it is not." *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1216 (7th Cir. 1998) (Wood, J., dissenting). Subsection § 16(a)(1)-(2) allows appeals "from orders that somehow prevent arbitration from going forward"; conversely, § 16(b) bars appeals "from interlocutory orders that in one way or another allow the arbitration to proceed." *Id.*

The other circumstance under which appeals are allowed is set out in § 16(a)(3)—"a final decision with respect to an arbitration that is subject to this title." The question here is whether the district court's order compelling arbitration of the issues raised in Randolph's complaint and dismissing her claims with prejudice falls within that category. If it does, we have jurisdiction. If it does not, the parties must proceed to arbitration.

In arguing that we lack jurisdiction, Green Tree distinguishes between "embedded" and "independent" proceedings, a distinction which has been drawn by a number of circuits that have considered § 16(a)(3). An "embedded" proceeding is one in which the arbitration issue arises as part of a broader action dealing with other issues. In this case, for example, Randolph's action alleges a substantive violation of the TILA as well as raising the arbitrability question; indeed, the motion to compel arbitration was filed by the defendant, Green Tree. In an "independent" proceeding, the motion to compel arbitration is the *only* issue before the court.

Several circuits have held that orders compelling arbitration which arise in embedded proceedings must be treated as interlocutory and non-appealable, not as "final decisions" under § 16(a)(3). *See, e.g., John Hancock Mut. Life Ins. Co. v. Olick,* 151 F.3d 132, 135-36 (3d Cir.1998); *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.,* 143 F.3d 626, 628 (1st Cir.1998) ("The general rule governing what constitutes a final decision under section 16 is that an order compelling arbitration is not final, and therefore not immediately reviewable, if the arbitrability issue is 'embedded'. . . ."); *Napleton,* 138 F.3d at 1212 (7th Cir.) ("[T]he jurisdictional lodestar of appealability is whether the decision favoring arbitration is from an independent or from an embedded proceeding."); *McCarthy,* 122 F.3d at 1244 (9th Cir.) (" '[I]f the motion

to compel arbitration is "embedded" in a substantive suit pending before that court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable.' " (quoting *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir.1994))); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir.1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir.1996) ("An order involving an embedded proceeding is always an interlocutory order; an order involving an independent claim is always final."); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto, S.p.A. v. Chilewich International Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993).

In most embedded proceedings treating orders compelling arbitration as interlocutory makes sense, because after the arbitrability issue has been decided, other issues remain in the case for the district court to resolve; so an order directing the parties to proceed to arbitration could not possibly be considered a "final decision" under § 16(a)(3). In cases like this one, however, where the district court's dismissal of the action leaves no additional issues for it to resolve, treating the distinction between embedded and independent proceedings as decisive makes less sense. Nevertheless, a number of circuits have adhered, with a concededly "myopic[]" focus, to the embedded/independent distinction when determining whether they had jurisdiction to hear an appeal under § 16(a)(3). *See Napleton*, 138 F.3d at 1213 ("[T]his Circuit has focused, almost myopically, on whether a proceeding is independent or embedded.").

The circuits taking this approach have insisted that a district court's order compelling arbitration in an embedded proceeding is interlocutory and non-appealable, even if the district court *dismisses* the remaining claims.

*See, e.g., Seacoast,* 143 F.3d at 628-29 (dismissal of embedded proceeding without prejudice is non-appealable); *Napleton,* 138 F.3d at 1212 (same); *McCarthy,* 122 F.3d at 1244-45 (arbitration order in embedded proceeding not appealable where district court dismissed action and ordered court clerk to close file); *Altman Nursing,* 84 F.3d at 771 (arbitration order in embedded proceeding non-appealable, even though district court's order ended all litigation); *Gammaro,* 15 F.3d at 95-96 (arbitration order non-appealable where court dismissed remaining issues).

By contrast, both the Sixth and Tenth Circuits have taken a less mechanical approach to the question of whether an arbitration order is an appealable "final decision" under § 16(a)(3). In *Armijo v. Prudential Insurance Co. of America,* 72 F.3d 793, 797 (10th Cir.1995), the Tenth Circuit treated the district court's dismissal of the plaintiffs' remaining claims, apparently with prejudice, as an appealable final decision. Similarly, in *Arnold v. Arnold Corp.—Printed Communications for Business,* 920 F.2d 1269, 1276 (6th Cir.1990), the Sixth Circuit recognized its appellate jurisdiction over an order compelling arbitration in an embedded proceeding, relying on the fact that the district court had entered final judgment and had "nothing left . . . to do but execute the judgment." *See also Napleton,* 138 F.3d at 1214-15 (Wood, J., dissenting); *McCarthy,* 122 F.3d at 1246-47 (Pregerson, J., dissenting); *Filanto, S.p.A.,* 984 F.2d at 61 n. 3 (dicta noting that at least a limited appeal might have been available "[h]ad the complaint been dismissed").

We are thus faced with a circuit split on the question whether a district court's order compelling arbitration in an embedded proceeding is an appealable "final decision" where it dismisses the remaining claims. This question is one of first impression in our circuit. In answering it. we begin by recognizing that "final decision" is a term of art

which was of long standing when Congress enacted § 16 (a)(3), and we will therefore take guidance from prior judicial interpretations of the term. *See, e.g., Napleton,* 138 F.3d at 1211. In interpreting this term, however, we proceed from a different position than circuits such as the Seventh Circuit, because we have never accorded the same degree of "talismanic significance," *id.*, that others have to the distinction between independent and embedded proceedings.

Instead, our interpretation of the term "final decision" has generally followed "the simplest traditional definition of finality: the decision has disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order." 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.17, at 18-19 (2d ed.1992). *See also Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945) (decision of the district court is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). We have taken that approach both with respect to the general provision dealing with the appealability of final decisions of the district courts, 28 U.S.C. § 1291[3] *see, e.g. Shannon v. Jack Eckerd Corp.*, 55 F.3d 561, 563 (11th Cir.1995), and with respect to the FAA itself, *see Thomson McKinnon Securities, Inc. v. Salter,* 873 F.2d 1397, 1399 (11th Cir.1989).[4] *See also Morewitz v. West*

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[3] 28 U.S.C. § 1291 states that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

[4] In *Thomson McKinnon,* we held that under what is now 9 U.S.C. § 16(a)(3), "decisions of the district court are final if they 'end[] the litigation on the merits and leave[] nothing for the [district] court to do but execute the judgment.'" *Thomson McKinnon,* 873 F.2d at 1399 (quoting *Catlin,* 324 U.S. at 233, 65 S.Ct. at 633). We also noted, however, that the finality of an order granting or

*of England Ship Owners Mut. Protection & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1361 (11th Cir.1995) (FAA case holding that decisions of the district court are final if they leave the district court with nothing to do but execute judgment, but relying on 28 U.S.C. § 1291, not 9 U.S.C. § 16(a)(3)).

In most arbitration appeals there will be little difference between the traditional definition of "final decision" and one that relies on the distinction between embedded and independent proceedings. If the district court's order compelling arbitration in a so-called embedded proceeding leaves other issues unresolved, the court will have more left to do than simply execute the judgment, so there will be no final decision. But that is not true in cases such as this one, where the district court dispensed with the remaining issues by dismissing the case. Only if we followed the other circuits (save the Sixth and Tenth) and attached excessive significance to the "embedded" versus "independent" proceeding distinction, instead of applying the venerable definition of "final decision," would we lack jurisdiction here.

That we decline to do. Nothing in the plain language of the statute requires us to make the embedded/independent distinction decisive. Moreover, the history of § 16(a)

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**denying a request to compel arbitration may depend on whether the order was "entered in the course of ongoing actions for legal or equitable relief on the underlying claims." *Id.* We held that because the sole question before the district court was subject to arbitration, its decision was final and appealable. We thus recognized the embedded/independent distinction (without using those labels), but did not need to decide whether an order like the one here, dismissing all the plaintiffs' claims in an embedded proceeding with prejudice, is a "final decision." More importantly, we did not attach a "talismanic significance" to the distinction between embedded and independent proceedings, but treated it as a part of our usual inquiry into whether the district court's decision leaves nothing for it to do but execute the judgment.**

(3)'s enactment favors our standard reading of "final decision," and counsels against attaching undue significance to the embedded/independent distinction. Section 16 was enacted against the background of the demise of the *Enelow-Ettelson* doctrine, which had employed the old distinction between law and equity to determine when a stay could be appealed. *See Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 191-92, 63 S.Ct. 163, 164-65, 87 L.Ed. 176 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 382-83, 55 S.Ct. 310, 311-12, 79 L.Ed. 440 (1935). The Supreme Court, applying the *Enelow-Ettelson* doctrine to arbitration law, acknowledged that the continuing application of this doctrine illustrated "the persistence of outmoded procedural differentiations." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 184, 75 S.Ct. 249, 254, 99 L.Ed. 233 (1955), but it did so nonetheless, "leaving Congress to make such amendments as it may find proper." *Id.* at 185, 75 S.Ct. at 254.

Ultimately, the Court abandoned the *Enelow-Ettelson* doctrine altogether. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287, 108 S.Ct. 1133, 1142, 99 L.Ed.2d 296 (1988). Soon after, Congress stepped in to "make *Gulfstream*, and the case law that it overruled, largely academic on the arbitration scene" by enacting what is now 9 U.S.C. § 16 as part of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, Title X, § 1019(a), 102 Stat. 4642, 4671 (1988). *See* David D. Siegel, Practice Commentary, 9 U.S.C. § 16, at 501 (West 1999).

In short, § 16 was enacted to clear away the deadwood and "furnish a clear rule for appealability of orders relating to arbitration proceedings," not to erect a set of distinctions as esoteric as the law-equity distinction. *Napleton*, 138 F.3d at 1217 (Wood, J., dissenting); *see also Arnold*, 920 F.2d at 1275 n. 5 ("[O]ne purpose in

passing the amendment was to give clarity to an area of the law that had become confused, obscure and relied on the procedural posture of the case."); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 361 (11th Cir.1989) (quoting a statement by Senator Howell Heflin that "under the prior doctrine, '[t]he appealability of orders that direct arbitration, stay arbitration, or stay judicial proceedings depend[ed] on accidents of procedure that d[id] not respond to any rational needs of either appeals timing or arbitration.' 134 Cong. Rec. S16284, S16309 (daily ed. Oct. 14, 1988)."). The intent behind § 16 is equally evident in the provision's legislative history, especially the Senate Judiciary Committee's statement that "under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from . . . a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court." *Arnold*, 920 F.2d at 1274-75 (quoting *Committee on the Judiciary, Section by Section Analysis on S1482*, 100th Cong., 2d Sess., 134 Cong. Rec. S16284, Oct. 14, 1988) (alteration in original omitted).

Our view that the embedded/independent distinction ought not defeat our jurisdiction in this case is also supported by logic and common sense. The Fifth Circuit's assertion that "[a]n order involving an embedded proceeding is *always* an interlocutory order," *Altman Nursing, Inc.*, 84 F.3d at 771 (emphasis added), is wrong. "While orders compelling arbitration in all independent arbitrability proceedings are necessarily final decisions, it does not logically follow that orders in all embedded arbitrability proceedings are necessarily interlocutory." *McCarthy*, 122 F.3d at 1247 (Pregerson, J., dissenting) (emphasis omitted).

That proposition is confirmed by this case. The district court could have stayed Randolph's claim pending arbitration, but it determined that all of the issues raised were arbitrable. Accordingly, it dismissed the case. Moreover, the dismissal was with prejudice. That is a feature that apparently was not present in most of the cases decided by circuits relying on the embedded/independent distinction. The opinions in those cases either involved dismissals without prejudice or did not clearly state the nature of the dismissal. " 'A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment.' " *Morewitz*, 62 F.3d at 1361 (quoting *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. Unit B 1982) (quotations omitted)).[5]

Thus, our reading of § 16(a)(3) compels our conclusion that where the district court effectively disposes of all other issues by issuing an order compelling arbitration and dismissing the remaining claims with prejudice, we have appellate jurisdiction over the case. Whatever usefulness the terms "embedded" and "independent" may have in describing some proceedings involving arbitration claims, we decline to follow the same "myopic and talismanic adherence to the independent/embedded distinction," *Napleton*, 138 F.3d at 1217 (Wood, J., dissenting) (quotations and citation omitted), that some circuits have exhibited. Because the district court's dismissal of Randolph's action with prejudice left it with "nothing . . . to do but execute the judgment," *Morewitz*, 62 F.3d at 1361 (quotation and

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[5] We have no occasion to decide whether an appeal from an order compelling arbitration in an embedded proceeding is a "final decision" when the district court dismisses the action *without* prejudice. We do note that this court has said that "dismissals without prejudice may be appealable [under 28 U.S.C. § 1291], [but] they are only appealable if they are 'final orders.' " *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1094 n. 7 (11th Cir.1996) (citation omitted).

citation omitted), we hold that its order compelling arbitration was an appealable "final decision" under 9 U.S.C. § 16(a)(3).

## B. THE ENFORCEABILITY OF THE ARBITRATION CLAUSE

Having determined that we have jurisdiction over this appeal, we now turn to the question whether the TILA precludes the enforcement of the arbitration clause in the retail installment agreement signed by Randolph. Because the arbitration clause signed by Randolph in this case fails to provide the minimum guarantees required to ensure that she can vindicate her statutory rights under the TILA, we conclude that the arbitration clause in this case is unenforceable.

As an initial matter, we recognize that "[a]rbitration ordinarily brings hardships for litigants along with potential efficiency. . . . In light of a strong federal policy favoring arbitration," some "inherent weaknesses" in the procedural apparatus of an arbitration "should not make an arbitration clause unenforceable." *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir.1998). The Supreme Court has stated, " '[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 1653, 114 L.Ed.2d 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S.Ct. 3346, 3359, 87 L.Ed.2d 444 (1985).)

Nevertheless, we held in *Paladino* that some procedural flaws present such barriers to a would-be litigant's exercise of his or her statutory rights that they render an

arbitration clause unenforceable. "When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable." *Paladino*, 134 F.3d at 1062 (citation omitted). As the Tenth Circuit has stated,

> As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[ ] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.

*Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir.1999) (citations omitted). While the arbitral forum usually serves as just such an alternative, some barriers of access to that forum may render an arbitration clause unenforceable. *See id.* at 1234 n. 3.

In particular, we held in *Paladino* that forcing a plaintiff to bear the brunt of "hefty" arbitration costs and "steep filing fees" constitutes "a legitimate basis for a conclusion that the [arbitration] clause does not comport with statutory policy." *Paladino*, 134 F.3d at 1062. Thus, we held that an employer's arbitration agreement did not "comport with [the] statutory policy" of Title VII because the plaintiff would have had to pay a filing fee of $2000 to arbitrate her claim of gender discrimination, and might have had to bear at least half the substantial cost of the arbitration. *Id.*

Other courts have raised similar concerns. *See Shankle*, 163 F.3d at 1234-35 & n. 3 (concluding that a "fee-splitting" provision of an arbitration agreement substantially limited an employee's use of the arbitral forum and therefore rendered the arbitration agreement unenforceable); *Cole v. Burns International Sec. Services, Inc.*, 105 F.3d 1465, 1484-85 & n. 12 (D.C. Cir.1997) (requiring an employer to bear the sole costs of an arbitrator's fees where the arbitration was imposed by the employer, and noting but declining to address the question whether an arbitrator's "refusal to waive filing and other administrative fees could preclude enforcement of an arbitration agreement").

The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum, and thus falls within our holding in *Paladino*. This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nonetheless be saddled with fees and costs in excess of any award. It does not say whether the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs, apply to the proceeding, whether some other set of rules applies, or whether the parties must negotiate their own set of rules.

At oral argument, Green Tree asserted that arbitrations arising under this clause typically do not use the AAA rules, but did not specify what set of rules applies. Nor did Green Tree describe the atypical cases in which

the AAA rules do apply. Green Tree also asserted at oral argument that the arbitrator may apportion the fees of the arbitration in his award, but that provides no guarantee that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order, despite the small sum that is likely to be the object of the dispute in arbitrations of this kind. Finally, Green Tree stated to us that no filing fees are required, but the arbitration clause itself says nothing about that, and whether there are filing fees is likely to depend on who conducts the arbitration, something the arbitration clause is silent about.

Accordingly, we conclude that the arbitration clause in this case is unenforceable, because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration. *See Paladino*, 134 F.3d at 1062 ("When an arbitration clause has provisions that defeat the remedial purpose of the statute, . . . the arbitration clause is not enforceable." (citation omitted)).

The facts of this case distinguish it from cases in which other circuits have held that an arbitration agreement was enforceable despite substantial arbitration costs. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir.1999), the First Circuit rejected an argument that the New York Stock Exchange's arbitration procedures were unenforceable to arbitrate a Title VII claim merely because plaintiffs could be charged high forum fees.[6] But the court in *Rosenberg* had before

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[6] The court did find, however, that the plaintiff should not be compelled to arbitrate her claims, because she was not given adequate notice that her statutory claims would be subject to arbitration. *See Rosenberg*, 170 F.3d at 20-21.

it a record suggesting that most successful arbitral claimants were awarded fees and costs; we lack similar information about how claimants fare under Green Tree's arbitration clause. Because the clause is silent on the subject of arbitration fees and costs, Randolph might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim.

Another distinguishable case is *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975 (2d Cir.1996). There, the defendants argued that an arbitration agreement was unconscionable and unenforceable because of high filing fees and arbitrators' costs. The Second Circuit held that the agreement was not unconscionable. *See Stuart*, 85 F.3d at 980-81; *see also Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir.1998) (relying on *Stuart* to find an arbitration agreement enforceable in a similar case, where the plaintiff's estimated total costs of arbitration were between $28,000 and $32,000). But the arbitration clause in *Stuart* arose in the context of a commercial franchise agreement, *see Stuart*, 85 F.3d at 977-78, not a small consumer transaction (as in this case) or an employment agreement (as in *Paladino*). It was challenged on the general grounds that the clause was unconscionable, whereas Randolph argues that the clause in this case prevents her from vindicating specific statutory rights under the TILA.

We conclude that the arbitration clause at issue here is unenforceable. Because we decide the issue on this ground, we need not decide whether the TILA precludes *all* arbitration agreements.

## IV. CONCLUSION

For these reasons, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion.

## APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
NORTHERN DIVISION

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No. 96-D-11-N

LARKETTA RANDOLPH, *et al.*,
*Plaintiffs,*

v.

GREEN TREE FINANCIAL CORP., *et al.*,
*Defendants.*

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Nov. 26, 1997

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*MEMORANDUM OPINION AND ORDER*

DE MENT, District Judge.

On January 25, 1994, Plaintiff Larketta Randolph purchased a mobile home from Better Cents Home Builders, Inc. in Opelika, Alabama. Randolph financed her purchase through Green Tree Financial Corp.—Alabama. Her financing documents required "vendors single interest" insurance, which protects the vendor or lienholder against the costs of repossession in the event of a default. (*See* Pl.'s Am.Compl., Ex. A.) The installment contract also contains an arbitration provision requiring the resolution of disputes "arising from or relating to" the contract.[1] (*See* Pl.'s Am.Compl., Ex. B, ¶ 17.)

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[1] The arbitration provision contained in Plaintiff's installment contract reads in pertinent part:

On January 3, 1996, Randolph filed the instant action. Her Complaint, as amended on December 10, 1996 and September 29, 1997, seeks recovery from Green Tree Financial Corp.—Alabama, Green Tree Financial Corp., and Green Tree Financial Servicing corporation (collectively "Green Tree")[2] under two theories: (1) violation

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> 17. ARBITRATION: All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration. . . . This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C.A. Section 1. . . . The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract.

(*See* Compl., Ex. B) (emphasis in original).

Paragraph 16 of Plaintiff's contract also states:

> 16. WAIVER OF JURY TRIAL. I hereby waive any right to a trial by jury that I have in any subsequent litigation between me and the seller, or me and any assignee of the Seller, where such litigation arises out of, is related to, or is in connection with any provisions of this Contract whether the Contract is asserted as the basis for a claim, counterclaim, or cross claim, or a defense to a claim, counterclaim, or cross claim.

(*Id.*)

[2] The retail installment contract executed by Randolph identifies Green Tree Corp. as the assignee. Green Tree—Alabama provides contract services for, and is a wholly owned subsidiary of, Green Tree Corp. Defendants contend that Green Tree Financial Servic-

of the Truth In Lending Act ("TILA") for failure to disclose the "vendors single interest" requirement; and (2) violation of the Equal Credit Opportunity Act ("ECOA") for requiring waiver of statutory causes of action.[3] Randolph also brings this action on behalf of a similarly situated class. (Am.Compl. ¶¶ 12-19.)

In lieu of an Answer, Green Tree filed a Motion To Stay Action and Compel Arbitration, as well as several subsequent briefs and memorandums in support thereof. Pursuant to a request from the court, Green Tree filed one consolidated pleading on October 31, 1997 styled "Motion Of [Green Tree] to Compel Arbitration, Motion To Stay, Or, In The Alternative, Motion To Dismiss And

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ing Corporation was not involved with Randolph's transaction, and that its activities in Alabama have not involved consumer finance transactions. Defendants submitted the Affidavit of Brian F. Corey in support of these contentions. Plaintiff has not presented any evidence in rebuttal, nor does the record disclose any evidence of Green Tree Financial Servicing Corporation's involvement in Randolph's transaction, or, consequently, the propriety of it remaining in this action. Accordingly, the court finds that Green Tree Financial Servicing Corporation is due to be dismissed from the above-styled action. *See* Fed.R.Civ.P. 12(b)(6); Fed.R.Civ.P. 41(b).

3 Plaintiff has filed a total of three Complaints: her original on January 3, 1996, a "Second Amended Complaint" on December 10, 1996, and an "Amended Complaint" on September 29, 1997. Her Second Amended Complaint alleges that the "procurement of the arbitration contract is a fraudulent scheme effectuated by the superior bargaining power of defendant to prevent litigation, in that it is placed in an inconspicuous place on the contract, and is therefore void and unenforceable." (Pl.'s Second Am.Compl. ¶ 12.) Her Second Amended Complaint alleges that this "fraudulent scheme" amounts to fraud in the inducement of the arbitration contract. (*Id.* ¶¶ 29-33.) In her subsequent Amended Complaint, however, Plaintiff does not reallege any fraudulent scheme on the part of Green Tree, nor do her subsequent pleadings on dispositive motions address this contention. The sole issue before the court, however, is the enforceability of the arbitration provision in Plaintiff's contract, not the merits of Plaintiff's Complaint.

Brief In Support Thereof." ("Defs.' Consolidated Mot.") These Motions are the subject of this Memorandum Opinion and Order. After careful consideration of the arguments of counsel, relevant law, and the record as a whole, the court finds that the collective Green Tree Motion To Compel Arbitration is due to be granted. Rather than stay this action, however, the court finds that dismissal with prejudice is appropriate. Accordingly, the court finds that the collective Green Tree Motion To Stay Action is due to be denied, but that the Motion To Dismiss is due to be granted. Finally, the court finds that Green Tree Financial Servicing Corp. is due to be dismissed as a party to this action.

## JURISDICTION

The court properly exercises subject matter jurisdiction pursuant to 28 U.S.C.A. § 1331 (federal question) and 15 U.S.C.A. § 1640. The parties do not contest personal jurisdiction or venue.

## DISCUSSION

Section 2 of the Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [4] 9 U.S.C.A. § 2. The effect of § 2 is "to create a body of

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[4] The parties do not contest the question of whether Plaintiffs' contract in this action satisfies the nexus to interstate commerce requirement of the FAA. (*See* Pl.'s Opp. at 6, n.2; Defs.' Consolidated Mot. at 2-3.) Accordingly, the court finds that for the purposes of this Memorandum Opinion and Order, Plaintiff's contract satisfies this jurisdictional prerequisite of the FAA. *See generally, Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Staples v. Money Tree, Inc.*, 936 F.Supp. 856 (M.D.Ala. 1996).

federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Section 3 provides for the stay of proceedings in federal district courts when an issue in the proceedings is referable to arbitration. 9 U.S.C.A. § 3. Section 4 provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C.A. § 4.

Whether an arbitration provision is enforceable, as opposed to the merits of the underlying dispute, is a question for the court. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir.1993). Any doubts about the scope of arbitrable issues should be resolved in favor of arbitration, even if the result is piecemeal litigation. *See Byrd*, 470 U.S. at 218-21; *Moses H. Cone*, 460 U.S. at 24; *Kelly*, 985 F.2d at 1069.

In enacting the FAA, Congress manifested a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (quoting *Moses H. Cone*, 460 U.S. at 24). The Act's purpose "was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.* at 24. Therefore, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, and courts must "rigorously enforce agreements to arbitrate." *Byrd*, 470 U.S. at 221.

Even with this strong federal policy in mind, however, arbitration is a matter of contract, and a party cannot be compelled to arbitrate any claims which he or she has not agreed to submit to arbitration. *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Accordingly, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Section 2 of the FAA allows courts to give relief where the party opposing arbitration presents "well supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (quoting *Mitsubishi Motors*, 473 U.S. at 627; 9 U.S.C.A. § 2).

Plaintiff bears the burden of demonstrating why the arbitration agreement in this action should not bind the parties, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26, 107 S.Ct. 2332, 96 L.Ed2d 185 (1987), and raises several grounds as to why the court should not compel arbitration. Alternatively, Plaintiff requests that the court certify a class before ordering arbitration.

## I. Enforcement Of The Arbitration Provision Is Not Statutorily Barred

### A. Background

Plaintiff contends that Green Tree's actions both in requiring "vendors single interest" insurance and in requiring arbitration of her claims violates her rights under

the TILA and ~~the~~ ECOA. Plaintiff's first argument is that requiring "vendors single interest" insurance "imposes an extra charge for insurance each year in the approximate amount of $15.00 and constitutes a clear violation of the [TILA]," because this charge was not disclosed.[5] (Pl's Opp. at 1.) The TILA requires the disclosure of certain credit charges articulated in the Act. *See* 15 U.S.C.A. § 1601, *et seq.*

Additionally, Plaintiff contends that under 15 U.S.C.A. § 1691(a)(3), a provision of the ECOA, "a consumer who wishes to reserve the right to judicial redress for such violations cannot be denied credit." (Pl.'s Opp. at 11.) Plaintiff further cites regulation B implementing the ECOA, which she contends "prohibits presenting terms which violate the Act to a consumer in such a manner as to convey the impression to a reasonable consumer that they are mandatory." (Pl.'s Reply at 3 (citing 12 C.F.R. § 202.4(1), Commentary).) Plaintiff argues that "in order to finance with Green Tree, it is necessary to submit all disputes . . . to arbitration." (Pl.'s Reply at 1.) Accordingly, "[b]y requiring consumers to sign a contract waiving statutory causes of action, Green Tree violates [the ECOA] which prohibits a creditor from requiring a waiver of rights." (Am. Compl. ¶ 27.) Essentially, Plaintiff con-

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[5] Plaintiff contends that: (1) "Green Tree is a creditor within the meaning of TILA;" (2) "The notes and security instruments signed by plaintiff and borrowers for the purchase of mobile homes were extensions of credit subject to TILA;" (3) "The requirement that insurance policies contain provisions covering Green Tree's possible repossession expenses are credit charges as defined by TILA and occur annually when each policy is renewed;" and (4) "No TILA disclosures are given by Green Tree." (*See* Am.Compl. ¶¶ 21-23.) Green Tree does not rebut these contentions and instead only addresses the merits of the arbitration issue. In this Memorandum Opinion and Order, however, the court only addresses the question of whether Plaintiff may be compelled to arbitrate her claims, not the merits of the underlying claims themselves.

tends that "[a] creditor may not condition the extension of consumer credit upon the consumer's waiving his right to judicial redress for violations of [TILA]." (Pl.'s Opp. at 19; *see also* Pl.'s Reply at 1.) In other words, "a creditor cannot insist that the consumer sign a predispute arbitration clause covering claims under [TILA]." (Pl.'s Opp. at 12.).

Hence, Plaintiff contends that because Green Tree fails to disclose the "vendors single interest" requirement in its TILA disclosures, she is entitled to damages, including attorney's fees and litigation expenses pursuant to 15 U.S.C.A. § 1640. (Am.Compl. at 6.) She requests similar damages for the alleged ECOA violations. (Am. Compl. at 7.)

Green Tree argues that "[e]nforcement of arbitration in the context of TILA claims does not run afoul of any of the provisions of the [ECOA]. Plaintiff has available to her the full panoply of rights granted by the ECOA, and the only limitation imposed is that her remedies be pursued in arbitration rather than in the judicial arena." (Defs.' Consolidated Mot. at 3.)

B. Analysis

In determining whether Congress intended to preclude waiver of judicial remedies, the Supreme Court has prescribed a two-step inquiry. First, the court must determine whether the Parties' agreement to arbitrate reaches the statutory issues, and then, upon finding it does, the court must consider whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims. *Mitsubishi Motors,* 473 U.S. at 629; *see also McMahon,* 482 U.S. at 226-27.

As for the first prong of the *Mitsubishi Motors* test, and resolving all doubts in favor of arbitration, *Byrd,* 470 U.S.

at 218-21; *Moses H. Cone*, 460 U.S. at 24; *Kelly*, 985 F.2d at 1069, the court finds that the arbitration provision at issue here reaches the statutory issues. The arbitration provision provides for binding arbitration of "[a]ll disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clauses or the entire contract." (*See supra*, n. 1.) The provision also provides that "[t]he parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract." *Id.* The court finds the terms of the provision to be sufficiently broad to encompass Plaintiff's TILA, ECOA, and other claims in this suit, notwithstanding Plaintiffs' protestations that the provision does not specifically reference applicable statutes. (Pl.'s Reply at 4); *see, e.g. Green Tree v. Lipham*, CV-96-D-208-N (M.D.Ala.1997) (De Ment, J.) (broadly construing same provision at issue here); *Ex parte Isbell*, 1997 WL 531100 (Ala., August 29, 1997) (same); *Ex parte Gates*, 675 So.2d 371 (Ala.1996) (same); *see also McCarthy v. Providential Corp.*, 1994 WL 387852 (N.D. Cal. July 19, 1994) (enforcing arbitration provision applicable to "any controversy or claim arising out of or relating to" loan documents even though it did not specifically reference any federal statute); *Lopez v. Plaza Finance Co.*, 1996 WL 210073 (N.D.Ill. April 25, 1996) (similar).

As for the second prong of the *Mitsubishi Motors* analysis, in *McMahon*, the Supreme Court stated that "[t]he Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims." 482 U.S. at 226. Indeed, as the *Mitsubishi Motors* court noted:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, the intention will be deductible from text or legislative history.[6]

*Mitsubishi Motors*, 473 U.S. at 628. The Supreme Court found "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Id.* at 625.

Even though there is no presumption against the arbitrability of statutory claims, and courts are to "rigorously enforce agreements to arbitrate," *Byrd*, 470 U.S. at 221, the party opposing arbitration may show that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," and avoid arbitration. *McMahon*, 482 U.S. at 227. "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deductible from [the statute's] text or legislative history,' . . . or from an inherent conflict between arbitration and the statute's underlying

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[6] *See also Gilmer*, 500 U.S. at 23 (holding that claims arising under the Age Discrimination In Employment Act may be subject to arbitration); *Rodriguez de Quijas*, 490 U.S. at 480-83 (holding that claims arising under § 12(a)(2) of the Securities Act of 1933, 15 U.S.C.A. § 77*l*(a)(2), may be subject to arbitration); *McMahon*, 482 U.S. at 238-42 (holding that claims arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-1968, may be subject to arbitration); *Mitsubishi Motors*, 473 U.S. at 629 (holding that claims arising under the Sherman Act, 15 U.S.C.A. §§ 1-7, may be subject to arbitration).

purpose." *Id.* (citing *Mitsubishi Motors,* 473 U.S. at 632-37; *Byrd,* 470 U.S. at 217). Accordingly, Plaintiff must show that Congress intended to preclude a waiver of judicial remedies from either the text of the statute(s), their legislative histories, or from an inherent conflict between arbitration and the statutes' underlying purposes. *Id.* at 227; *see also Gilmer,* 500 U.S. at 26-27. Green Tree argues, and the court agrees, that Plaintiff does not meet her burden.

First, Plaintiff does not cite any provision of the text or legislative history of either the TILA or the ECOA that expressly precludes waiver of judicial remedies. In other words, Plaintiff has not shown that Congress intended for all disputes arising thereunder to be resolved solely by the courts. Instead, Plaintiffs' principal argument is based on her perceived conflict between arbitration and the statutes' underlying purpose: "[u]nder TILA, a consumer has a statutory right to judicial redress, including the right to bring a class action." (Pl.'s Opp. at 11 (citing 15 U.S.C.A. § 1640).) The possibility of class-action exposure, argues Plaintiff, " 'is essential to the prophylactic intent of the Act, and is necessary to elevate truth-in-lending lawsuits from the ineffective nuisance category to the type of suit which has enough sting to insure that management will strive with diligence to achieve compliance.' " (Pl.'s Opp. at 12 (citing *Bantolina v. Aloha Motors,* 419 F.Supp. 1116, 1120 (D.Haw. 1976);) *see also* Pl.'s Reply at 1-2). Plaintiff argues that "[f]ew, if any, borrowers will submit claims to arbitration in this amount [$15-20 per year]. The purpose of the Truth in Lending Act will thus be completely thwarted by allowing an arbitration clause to stand." (Pl.'s Reply at 2-3.)

Further, Plaintiff argues that under 15 U.S.C.A. § 1691, "a consumer who wishes to reserve the right to judicial

redress for such violations cannot be denied credit." (Pl.'s Opp. at 11.) Section 1691 provides in pertinent part:

> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> (3) because the applicant has in good faith exercised any right under this chapter.

15 U.S.C.A. § 1691(a)(3). Plaintiff contends that this provision prevents a creditor from requiring a consumer to waive their "statutory right" to judicial redress under the TILA. (Pl.'s Opp. at 11-12.) Because of this "statutory right," Plaintiff contends that "a creditor cannot discriminate with respect to the extension of credit if the consumer insists on preserving the right to seek judicial redress." In essence, Plaintiff's argument is that "a creditor cannot insist that the consumer sign a predispute arbitration clause covering claims under [TILA]." (Pl.'s Opp. at 12.)

As an initial matter, the court notes that contrary to Plaintiffs' assertion, a creditor insisting that a consumer sign a predispute arbitration clause is not similar to a creditor discriminating with respect to the extension of credit if the consumer insists on preserving the right to seek judicial redress. (*See Id.* at 12.) Indeed, Plaintiff apparently recognizes as much when she argues that Green Tree admits that: "[I]f Plaintiff had asked to obtain credit without an arbitration clause so she could pursue rights under TILA and been denied, plaintiff would have an ECOA claim.[7] (Pl.'s Reply at 3.) It is important

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[7] Green Tree contends that contrary to Plaintiff's assertion, it does not "admit" to anything. (Defs.' Consolidated Mot. at 27, n. 9.) Regardless of this dispute, the court merely utilizes Plaintiff's statement to show that Plaintiff recognizes the distinction between a creditor bargaining for an arbitration provision in its

to note that Plaintiff's statutory argument is not that she was denied credit because she refused to sign an arbitration clause. Rather, Plaintiff concedes that she signed the contract with the arbitration provision. Her contention is merely that arbitration should not be required under the TILA and the ECOA.[8]

A creditor can bargain for any provision in a contract, including an arbitration provision, as long as it is legal or does not violate public policy. A consumer who voluntarily enters into a contract with a creditor is bound by the terms and conditions of that contract, assuming no applicable legal or equitable conditions work to render the contract void or voidable. The situation where a consumer enters into a contract containing an arbitration provision, and thus precludes judicial remedies, is much different from the consumer being denied credit because he or she refuses to sign a contract with an arbitration provision. In this action, Green Tree is merely attempting to enforce a predispute arbitration provision. Contrary to Plaintiff's suggestions in her pleadings, she does not argue that she was forced to sign an arbitration provision against her will, or that she was denied credit because she refused to sign a contract with an arbitration provision. She merely contends that requiring arbitration, even though she signed a contract agreeing to arbirate, would violate the underlying purpose of TILA in two ways: (1) by precluding class action litigation as provided for in the statute; and (2) by thwarting the underlying consumer protection purposes of the Act.

Plaintiff relies on the provisions of 15 U.S.C.A. § 1640 for the proposition that because Congress provided for

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contract, and a creditor refusing to extend credit to a consumer because the consumer refuses to accede to an arbitration provision.

[8] Plaintiff also proffers various contractual grounds for not enforcing the arbitration provision which the court addressess *infra*.

class actions under the TILA, Green Tree cannot condition credit on preclusion of class actions or other judicial remedies. Plaintiff also contends that 15 U.S.C.A. § 1691 (a)(3) prohibits the conditioning of the extension of credit on a consumer's waiver of rights provided under the TILA and other consumer protection statutes. However, § 1640 does not create a "statutory right" to pursue class action litigation or other judicial redress, as Plaintiff contends. Section 1640 merely provides for jurisdictional requirements and liability limitations. *See* 15 U.S.C.A. § 1640; *see also Lopez*, 1996 WL 210073 at *3; *Truckenbrodt v. First Alliance Mortgage Co.*, 1996 WL 422150 (N.D.Ill.1996). Providing for class action litigation does not necessarily preclude any other type of dispute resolution or provide Plaintiff with a substantive "right." As the *Gilmer* court noted: "the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32.

The underlying purposes of a statute may, however, preclude waiver of class claims, regardless of contractual provisions entered into between the parties. *See Mitsubishi Motors*, 473 U.S. at 632-37; *Byrd*, 470 U.S. at 217. But, a statute containing provisions governing class action litigation, without more, does not provide a plaintiff with the substantive right to bring her claims as the representative of a similiarly situated class. The Supreme Court addressed this argument in *Gilmer*, where, in the context of the Age Discrimination In Employment Act, it stated that submitting a claim to arbitration does not operate to waive the consumer's rights: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 500 U.S. at 26; *see also Rodriguez de Quijas*, 490

U.S. at 480; *McMahon*, 482 U.S. at 229-30. Congress did not explicitly preclude arbitration or other nonjudicial resolution of TILA and/or ECOA claims, and Plaintiff has not shown such intention discernible from the text or legislative history.

Additionally, permitting binding arbitration of these statutory claims is consistent with statutory provisions, such as 15 U.S.C.A. § 1640(e), that grant concurrent state and federal jurisdiction for hearing such claims. Where Congress provides for alternate fora, it does not necessarily follow that Congress intended to preclude fora not specifically provided for in the statute. Nor does it follow that Congress intended to limit fora to only those specifically enunciated. Unless otherwise indicated, Congress is merely providing procedural avenues of redress that do not necessarily preclude other avenues; Congress is not providing a substantive right to pursue a class action. As the *Gilmer* court noted: "arbitration agreements, 'like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.' " 500 U.S. at 29 (quoting *Rodriguez de Quijas*, 490 U.S. at 483). Class actions are procedural devices, while "arbitration is contractual and therefore substantive." *Sanders v. Robinson Humphrey/American Exp. Inc.*, 634 F.Supp. 1048, 1065 (N.D.Ga. 1986), *aff'd in part, Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n. 5 (11th Cir.1987) (noting the Supreme Court's holding in *McMahon* precluding class treatment of plaintiffs subject to an arbitration agreement). Procedural devices may not supersede substantive rights. *Id.*

The court finds unpersuasive Plaintiff's reliance on case law holding that § 1691(a)(3) bars a creditor from conditioning an extension of credit on the *release* of po-

tential claims for TILA violations arising in the past. (Pl.'s Opp. at 12-14.) In this regard, Plaintiff relies heavily on *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir.1982). In that case, the sole issue before the Eleventh Circuit was "whether a general release discharging [a creditor] from any claims arising out of the purchase of an automobile constitutes a valid waiver of (Plaintiff's) claims under TILA." *Id.* at 1179. More specifically, the court was solely addressing the question of "whether a person may waive a TILA claim." *Id.* at 1180 (emphasis added). The court held that *under the facts of that case*, the particular release executed by the Plaintiff did not bar a claim under TILA. *Id.* at 1182. Although it discussed the statutory purpose behind TILA, the court specifically held only that the plaintiff's release "[did] not bar her TILA claim because we are convinced that *she was unaware that the release encompassed her TILA* rights." *Id.* (emphasis added). The court did not explicitly base its holding on the underlying purpose of the TILA, but rather on the plaintiff's level of knowledge.

As Green Tree notes, "there is a vast distinction between an instrument which completely absolves a creditor from liability for a previously committed TILA violation (a release) and an instrument which preserves the debtor's rights to pursue future claims against the creditor but prescribes that these claims be resolved by arbitration (an arbitration clause)." (Defs.' Consolidated Mot. at 14.) Preclusion of a claim through a release is fundamentally different from an arbitration provision specifying the particular forum for resolution of a claim. The former prevents a claim from being brought at all; the latter merely provides the forum for its resolution—it does not preclude the consumer from bringing a claim. *See Gilmer*, 500 U.S. at 26; *see also Rodriguez de Quijas*, 490 U.S. at 480; *McMahon*, 482 U.S. at 229-30.

In that context—the preclusion of bringing a TILA claim—the *Parker* court noted that:

> The public benefits from enforcement of TILA because it creates a system of disclosure that improves the bargaining posture of all borrowers. To ensure the realization of this goal, Congress granted consumers a minimum recovery, plus costs and reasonable attorney's fees, without having to prove actual damages. . . . This type of remedy provides a deterrent comparable to exemplary damages because it encourages individuals to bring TILA actions and discourages noncompliance. Strict technical compliance, regardless of actual injury, promotes the standardization of credit terms for the benefit of all borrowers, not just the individual claimant.
>
> Not only does TILA contemplate a public interest in the enforcement of individual rights, but the public must rely largely on the efforts of individual consumers acting as "private attorneys general" to achieve the disclosure system envisioned by the Act. . . . If these private attorneys general are permitted to waive TILA claims in circumstances such as those presented in this case, the public interest in deterring inconsistent and undecipherable lending practices would be greatly hampered. The significance of this possibility becomes clearer when we consider that the confusion, and perhaps ignorance, that has led consumers in the past to accept draconian credit terms leaves them equally vulnerable when the lender gives them a general release of prospective claims to sign. The Truth In Lending Act was necessary exactly because borrowers could not force creditors to provide voluntarily a system of credit within which consumers could function intelligently.

*Parker*, 673 F.2d at 1181 (citations omitted). Significantly, the *Parker* court spoke only of the conflict between a release and the underlying purposes of the TILA. Noticeably absent from the above quoted passage is any discussion of conflict, actual or apparent, between *arbitration* and the TILA's underlying purpose. As noted, a release precludes claims; in contrast, an arbitration provision merely prescribes the forum for hearing those claims. *See also Kelly v. UHC Management, Co., Inc.*, 967 F.Supp. 1240, 1258 (N.D. Ala.1997) (noting distinction between a complete release of liability and an arbitration provision's mere choice of forum).

Plaintiff also relies on *Parker* for the proposition that "TILA is imbued with a public purpose with individuals and their attorneys serving as private attorneys-general. The specific grant of the right to bring class action litigation is part of enforcing that public purpose. . . . [T]he removal of class action relief through arbitration would in essence eliminate compliance with TILA." (Pl.'s Reply at 4.) A close reading of *Parker*, however, shows that the Eleventh Circuit noted that to "ensure realization" of the enforcement of TILA's system of disclosure (compliance), "Congress granted consumers a minimum recovery, plus costs and reasonable attorney's fees, without having to prove actual damages. 15 U.S.C. § 1640(a). This type of remedy provides a deterrent comparable to exemplary damages because it encourages individuals to bring TILA actions and discourage non-compliance. Strict technical compliance, regardless of actual injury, promotes the standardization of credit terms for the benefit of all borrowers, not just the individual claimant." *Parker*, 673 F.2d at 1181.

Thus, although the language of *Parker* could be construed to support the assertion that class action litigation acts to ensure compliance *in addition* to the provisions

for minimum recovery without having to prove actual damages, the Eleventh Circuit has not expressly so held. An equally logical reading of the class action provisions of the TILA, absent *Parker*, could be that because they provide for *limits* on recovery in class actions, Congress was actually concerned with consumers inundating creditors with class actions and securing large recoveries, and thus § 1640 was enacted to actually protect creditors as opposed to ensuring compliance with the Act as Plaintiff contends.

The court emphasizes that it is not indicating that this was the actual intent of Congress. *Parker*, however, is essentially inapplicable to the facts of this action. The Eleventh Circuit addressed a preclusion of claims through a release rather than an arbitration provision's prescription of a forum for hearing those claims. Further, the Eleventh Circuit limited its holding in *Parker* to the facts of the case before it. *Parker*, 673 F.2d at 1182. Consequently, *Parker* falls out of the analysis, and the court is left with Plaintiff's bare assertion, without supporting authority, of what she perceives to be the Congressional intent behind § 1640. While it is true that compliance with TILA, and realization of its deterrent effect, is even more likely if creditors are subject to class actions in addition to Plaintiffs not being required to show actual damages, Plaintiff fails to cite any compelling evidence in support of her position. Absent such evidence, the court finds that Plaintiff has failed to meet her burden of showing why the arbitration provision in her contract should not be enforced.[9]

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[9] Plaintiff also cites *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) in support of her position. The court deems it sufficient to note that: (1) the factual situation in *Lai* was far removed from the facts of this case, and are not analogous; (2) *Lai* is not binding precedent in this Circuit; and (3) a multitude of

## II. Plaintiff's Contractual Arguments Fail

As noted *supra*, "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *see also, Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (citing *Byrd*, 470 U.S. at 219); *AT & T Tech.*, 475 U.S. at 648. Plaintiffs contends that there is no consideration for the arbitration clause in her financing documents because the arbitration clause requires the consumer to arbitrate all suits, but gives Green Tree the option of using judicial or non-judicial relief to enforce a security agreement. (Pl.'s Reply at 5; Pl.'s Opp. at 15.) In other words, the arbitration provision "requires the consumer to arbitrate everything but does not require Green Tree to arbitrate anything." (Pl.'s Opp. at 15-16.) Plaintiff also contends that she did not knowingly agree to arbitrate her statutory claims. (Pl.'s Opp. at 20.) Plaintiff argues that "a litigant can only be required to arbitrate a federal statutory claim 'if she has knowingly agreed to submit such disputes to arbitration.'" (*Id.* (quoting *Lai*, 42 F.3d at 1305).) In response, Green Tree admits that a contract generally requires consideration, but argues that the provision at issue in this action was amply supported by consideration. Green Tree also contends that Plaintiff did, in fact, knowingly agree to arbitrate her claims.

Because Plaintiff's contractual arguments are directed exclusively to the arbitration provisions, and not to her

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courts have either limited *Lai's* holding or restricted its application. (*See* Defs.' Consolidated Mot. at 16, n. 4, and accompanying text.)

contract as a whole, the court may properly address these issues. *See Prima Paint Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *Wheat, First Securities, Inc. v. Green*, 993 F.2d 814 (11th Cir.1993); *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1441-42 (M.D.Ala.1997). In doing so, the court applies state law governing the formation of contracts, keeping in mind the strong federal policy favoring arbitration. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Volt Info.*, 489 U.S. at 468; *American Express Fin. Advisors v. Makareiwicz*, 122 F.3d 936, 940 (11th Cir. 1997); *Roberson v. Money Tree of Ala.*, 954 F.Supp. 1519, 1528 (M.D.Ala.1997).

A. The Arbitration Provision Is Supported By Consideration

Plaintiff contends that the arbitration provision requires the consumer to arbitrate everything, but does not require Green Tree to arbitrate anything. (Pl.'s Opp. at 15-16.) Pursuant to *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir.1985), Plaintiff argues such "one-way" arbitration clauses are not enforceable. (*Id.*) Plaintiff's consideration argument, essentially, is that the arbitration provision is unenforceable for lack of mutuality of obligation. *See WMX Technologies, Inc. v. Jackson*, 932 F.Supp. 1372, 1374 (M.D. Ala.1996) ("mutuality of obligation is properly viewed as an elaboration of the concept of consideration").

In *Hull*, the Eleventh Circuit, utilizing New York law, addressed an arbitration agreement that required one party to arbitrate but left the other party free to choose between arbitration and judicial enforcement. 750 F.2d at 1549-50. The Eleventh Circuit held that under New York contract law, "the consideration exchanged for one

party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration provision." *Id.* at 1550. New York law required mutuality; an arbitration provision was unenforceable unless both parties to the contract exchanged reciprocal promises to arbitrate.

*Hull's* mutuality requirement, based on New York law, has not been widely acepted. Indeed, New York itself has subsequently overruled its mutuality requirement. *See Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513, 535 N.E.2d 643, 646 (1989) ("mutuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement"); *see also Latifi v. Sousa*, 1996 WL 735260 at *5 (recognizing same and quoting *Design Benefit Plans, Inc. v. Enright*, 940 F.Supp. 200, 204 (N.D. Ill.1996) ("as far as New York law is concerned, *Hull* is no longer good law")). *Latifi* also notes *Hull's* lackluster reception in a multitude of jurisdictions, including distinguishment on the grounds that *Hull's* mutuality requirement was unique to New York state, or outright rejection of its holding. *See Latifi*, 1996 WL 735260 at *4; *see also Kelly*, 967 F.Supp. at 1259 (declining to follow *Hull* because New York law was inapplicable); *W.L. Jorden & Co. v. Blythe Ind., Inc.*, 702 F.Supp. 282, 284 (N.D. Ga.1988) (same). Because the *Hull* court was following New York law, and Alabama law is applicable in the instant action, Plaintiff's reliance on *Hull* is misplaced.

Contrary to Plaintiff's assertions, Alabama law is not similar to pre-*Sablosky* New York law, the law interpreted in *Hull*; in Alabama, mutuality in arbitration provisions is not required. Under Alabama law, mutuality:

> [D]oes not mean equal rights under the contract, or that each party is entitled to the same rights or covenants under the contact. So long as there is a valuable consideration moving from one side to the other, or there are binding promises on the part of each party to the other, there is adequate consideration for a valid contract.

*Marcrum v. Embry*, 291 Ala. 400, 282 So.2d 49 (1973). "If there is consideration, there need to be" mutuality of obligation. *Sherrill v. Alabama Appliance Co.*, 240 Ala. 46, 197 So. 1 (1940). Further, in a recent decision, the Alabama Supreme Court acknowledged that no severable or identical consideration is required for an arbitration provision to be enforceable. *Northcom, Ltd. v. James*, 694 So.2d 1329, 1335-36 (Ala.1997). The court merely required ample consideration between the parties in the contract the arbitration provision governs. *Id.*; *see also Goodwin v. Ford Motor Credit Co.*, 970 F.Supp. 1007, 1011 (M.D.Ala.1997).

Alabama contract law does not require mutuality—"equal or reciprocal consideration is not required. . . . So, under Alabama law, even a unilateral arbitration agreement is enforceable, so long as the contract in which it is contained contains some consideration given by each side." *Latifi*, 1996 WL 735260 at *5 (citing *in accord WMX Technologies*, 932 F.Supp. at 1375). Having noted that Plaintiff's contentions are unsupported by *Hull* or by Alabama law, the court finds that the contract between the parties at issue here—and consequently the arbitration provision contained therein—is supported by ample consideration. There are mutually enforceable promises in the contract. Plaintiff's argument accordingly fails.

B. Plaintiff Knowingly Consented To Arbitration

Plaintiff contends that "a litigant can only be required to arbitrate a federal statutory claim if 'she *knowingly* agreed to submit such disputes to arbitration.' " (Pl.'s Opp. at 20 (citing *Lai*, 42 F.3d at 1305) (emphasis added).) She argues that *Parker* supports her contentions because the Eleventh Circuit "held that a release was ineffective to bar plaintiff's TILA claim 'because we are convinced that she was unaware that the release encompassed her TILA rights.' " (*Id.* at 20-22 (citing *Parker*, 673 F.2d at 1182) (emphasis added).) Essentially, Plaintiff is arguing that she has to have "knowledge" of any "right" that she is waiving.

Green Tree contends that "if Plaintiff did not know of the existence of the arbitration provision, it was because she did not take the time to read the installment contract." (Defs.' Consolidated Mot. at 47.) Green Tree points to portions of Plaintiff's deposition which it contends establishes that "any lack of knowledge on her part was not because she could not have read and understood the arbitration clause when she entered into it but, instead, was because of her lack of diligence in taking the time to read the contract when she signed." (*Id.* at 48.)

In arguing that *Parker* precludes enforcement of the arbitration provision, Plaintiff is arguing that enforcement is only appropriate if she "knowingly" agreed to arbitration. In other words, Plaintiff contends that the arbitration provision requires her to waive what she contends to be a substantive right (the right to proceed with a class action), and *Parker* requires the waiver of a substantive right to be made with knowledge. In *Parker*, the Eleventh Circuit held that the plaintiff's *release* did not bar her TILA claims because "she was *unaware* that the release encompassed her TILA rights." *Parker*, 673 F.2d at 1182 (emphasis added).

As noted, *supra*, a release operates as a waiver of substantive rights—the right to pursue claims. In contrast, an arbitration provision does not operate to waive substantive rights (claims), it merely prescribes the forum for enforcing those rights and resolving those claims. Accordingly, *Parker's* holding that on the facts of that case the release did not bar plaintiff's TILA claims because the plaintiff was unaware that the release operated to waive such claims, is inapplicable to the facts of this action. Plaintiff's argument that because *Parker* requires a knowing waiver of rights in a release, the same standard of knowledge should be applied to an arbitration provision is simply incongruous. Again, the court notes the Supreme Court's language in *Gilmer:* [A] party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26 (citing *Mitsubishi Motors*, 473 U.S. at 628). Plaintiff's agreement to arbitrate does not involve a waiver of a substantive right, and the heightened knowledge standard articulated in *Parker* is not applicable to the case at bar. *See also Puentes v. United States Serv., Inc.*, 86 F.3d 196, 198 (11th Cir.1996) (applying knowing and voluntary standard to employee's release of employer from Title VII and 42 U.S.C. § 1981 liability); *Kelly*, 967 F.Supp. at 1257-58.

In her deposition, Plaintiff states that when she received the contract containing the arbitration provision, she "went over the front and glanced over the back." (Randolph Dep. at 51, *See* Green Tree Evidentiary Submission In Supp., Ex 3.) At that time, she did not see anything that caused her any concern. (*Id.*) Plaintiff admits that she could have taken the time to look at the back of the contract if she had wanted to. (*Id.* at 79.) Plaintiff also admits that Green Tree representatives did not say anything to her on a visit to her home that she now contends was

false or untrue. (Pl.'s Dep. at 73.) Nor is there any contention elsewhere in Plaintiff's deposition or pleadings that Green Tree intentionally misled her, made statements that she now contends are false or untrue, or coerced her in anyway into signing her contract.

Plaintiff's deposition testimony establishes that she read the front of her contract, and "glanced" at the back. Green Tree did not pressure Plaintiff or force her to sign the contract without reading it—she admits she could have taken more time if she had wanted to. Nothing concerned her at that time. There is no evidence that Green Tree made any false statements to Plaintiff, or misled her in any way. The evidence merely shows that Plaintiff did not read the back page of her contract—where the arbitration provision was located.

Plaintiff cannot complain now about an agreement to arbitrate she admittedly did not read at the time she signed the contract. *Kelly*, 967 F.Supp. at 1257. Plaintiff's failure to read what she signed does not insulate her from her contractual obligations, including the agreement to arbitrate. *Coleman v. Prudential Bache Sec. Inc.*, 802 F.2d 1350 1352 (11th Cir.1986) (per curiam) ("absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed"); *Ex parte Stripling*, 694 So.2d 1281, 1283-84 (Ala.1997) (holding that even though plaintiffs did not read the contracts before signing, "ordinarily when a competent adult, having the ability to read and understand an instrument, signs a contract, he will be held to be on notice of all the provisions contained in that contract and will be bound thereby").

This action does not involve a release of liability, as did *Parker*. Instead, it involves an agreement to arbitrate claims arising out of or related to Plaintiff's contract

rather than pursuing those claims in a court of law. Plaintiff had an unfettered opportunity to read her contract. Yet, by Plaintiff's own admission, she merely "glanced over" the back—the page with the arbitration provision. Plaintiff cannot argue that she did not knowingly enter into the arbitration provision based on her admitted failure to read those provisions dealing with arbitration. Under these facts, the court finds that Plaintiff voluntarily and knowingly entered into her contract, including the arbitration provisions contained therein, notwithstanding Plaintiff's contentions that *Parker*'s heightened knowledge requirement applies. The court finds that a release is sufficiently dissimilar in terms of legal effect so as to distinguish the facts and holding of *Parker* from the facts of this case. Accordingly, Plaintiff's argument that she did not knowingly enter into an agreement to arbitrate must fail.

## III. The Court Declines To Certify A Class

It is true that compelling arbitration in this instance will eliminate Plaintiff's ability to arbitrate her claims on behalf of a class. Nevertheless, Congress has not created a statutory right—as opposed to a procedural mechanism —to bring class actions under the TILA. Further, the Supreme Court has repeatedly emphasized that courts are to rigorously enforce the parties' agreement as they wrote it; the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 21 (emphasis in original); *see also Byrd*, 470 U.S. at 221.

In addition, Plaintiff mistakenly asserts that "the Court's authority to certify a class to proceed in arbitration is questionable." (Pl.'s Opp. at 22.) It is not. In *Protective Life Ins. v. Lincoln Nat. Life Ins.*, 873 F.2d 281 (11th Cir.1989) (per curiam), the Eleventh Circuit addressed

the issue of "whether a district court may consolidate arbitration proceedings if the parties have not provided for consolidation in their arbitration agreements." *Id.* at 282. The Eleventh Circuit concluded "that [a district court] may not." *Id.* The court noted that § 4 of the FAA "limits the power of the court to determining whether a written arbitration agreement exists, and if it does, to enforcing it 'in accordance with its terms.'" *Id.* (citing 9 U.S.C. § 4). The court quoted the Ninth Circuit's observation in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.1984), *cert. denied*, 469 U.S. 1061, 105 S.Ct. 544, 83 L.Ed.2d 431 (1984), that:

> this interpretation of section 4 "comports with the statute's underlying premise that arbitration is a creature of contract, and that '[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in.

*Protective Life*, 873 F.2d at 282.

The court went on to hold that the agreements between the parties in *Protective Life* "contain their own arbitration clauses, and each clause requires arbitration only between the parties to that agreement. The [parties] never agreed to consolidated arbitration." *Id.*; *see also Kirkpatrick*, 827 F.2d at 725, n. 5. Therefore, because the contracts did not provide for arbitration on a class basis, the Eleventh Circuit declined to read such a pro-

vision into them, and instead, merely enforced the terms of the contract requiring individualized arbitration. The Second, Fifth, Sixth, Seventh, Eight and Ninth Circuits have also held that absent either an express provision in an arbitration clause or statutory authority, courts should not order consolidated arbitration. *See, e.g., Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir.1995); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir.1993); *American Centennial Ins. v. National Casualty Co.*, 951 F.2d 107 (6th Cir.1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir.1990); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir.1987); *Weyerhaeuser Co.*, 743 F.2d at 635; *c.f. Compania Espanola de Petroleos S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir.1975), *cert. denied*, 426 U.S. 936, 96 S.Ct. 2650, 49 L.Ed.2d 387 (1976) (holding that a district court could order consolidated arbitration pursuant to Federal Rules of Civil Procedure 42(a) and 81(a)(3)).

Accordingly, regardless of the wisdom of denying class certification because the agreement between the parties did not provide for class certification for arbitration purposes, *see Champ*, 55 F.3d at 277-78 (Ilana Diamond Rovner, J., concurring), this court is bound by circuit precedent, and thus is required to decline Plaintiff's invitation to certify a class.

## IV. Conclusion

Section 3 of the FAA allows a court to stay the proceeding in an action and compel arbitration. 9 U.S.C.A. § 3. However, where all of the issues raised in a complaint must be submitted to arbitration, dismissal of an action is appropriate. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir.1992); *Boyd v. Homes Of Legend, Inc.*, 981 F.Supp. 1423, 1997 WL

619208 *20 (M.D.Ala. 1997); *McCarthy*, 1994 WL 387852 at *9. Accordingly, the court will dismiss Plaintiffs' claims, with prejudice, and compel her to submit them to binding arbitration pursuant to the arbitration provision in her contract.

## ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that:

(1) The collective Defendants' Motion To Compel Arbitration be and the same is hereby GRANTED.

(2) The collective Defendants' Motion To Stay Action be and the same is hereby DENIED.

(3) The collective Defendants' Motion To Dismiss be and the same is hereby GRANTED. Such dismissal is WITH PREJUDICE.

(4) Defendant Green Tree Financial Servicing Corporation be and the same is hereby DISMISSED as a party Defendant to this action.

(5) Plaintiff is herewith ENJOINED and RESTRAINED from failing forthwith to arbitrate her claims against the remaining Green Tree Defendants.

APPENDIX C

[Filed Jan. 5, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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Case No. 96-D-11-N

LARKETTA RANDOLPH, *et al.*,
*Plaintiff*,

v.

GREEN TREE FINANCIAL CORP.—ALABAMA, *et al.*,
*Defendants.*

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ORDER

Before the court is Plaintiff's Motion For Reconsideration filed December 10, 1997. Defendants filed a response on December 29, 1997. Plaintiff initially filed suit alleging violations of the Truth In Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA"). Plaintiff also brought this action on behalf of a similarly situated class. On November 26, 1997, the court issued a Memorandum Opinion and Order ("Order") granting Defendants' Motion To Compel Arbitration, denying Plaintiff's request to certify a class, dismissing this action, with prejudice, and enjoining Plaintiff from failing to arbitrate her claims against the Defendants.

In its November 26, 1997 Order, the court noted that the only way Plaintiff could avoid arbitration would be through a showing of Congress' intent to preclude arbitration of TILA or ECOA claims. (Order at 9-11.) Such

an intent must be shown either through the text of the Acts, their legislative histories, or from an inherent conflict between arbitration and the Acts' underlying purposes. (Order at 11.) Plaintiff bore the burden of showing why the arbitration agreement at issue in this case should not bind the parties. (Order at 6.)

In her Motion For Reconsideration, Plaintiff asserts that the court ignored "*the only* binding precedent with respect to this particular issue," namely *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997), *aff'd* 127 F.3d 40 (11th Cir. 1997). (Mot. For Recons. at 1 (emphasis in original).) Plaintiff contends that *Waverlee Homes*, a decision rendered pursuant to the Magnuson-Moss Warranty-Trade Commission Improvement Act, controls the court's disposition of this action. In *Waverlee Homes*, the court analyzed highly detailed and specific provisions of the Magnuson-Moss Act and concluded that Congress intended to preclude binding arbitration of *written* warranty claims arising under the Act. *Id.* at 1537-39; *see also Boyd v. Homes of Legend, Inc.*, 1997 WL 619-208, *12-13 (M.D. Ala. 1997). In *Boyd*, however, the court concluded that *non-written and implied* warranty claims arising under the Magnuson-Moss Act could be subject to arbitration. *Boyd*, 1997 WL 619208 at *18. In other words, the court found that even though Congress intended to preclude arbitration of *written* warranty claims under the Magnuson-Moss Act, it did not intend to preclude arbitration of *non-written or implied* warranty claims. *Boyd*, 1997 WL 619208 at *14, *18.

Significantly, these findings were made even though the Congressional intent of the Magnuson-Moss Act was to "improve the adequacy of information available to consumers, [and] prevent deception," *see Boyd*, 1997 WL 619208 at *11. The court in *Waverlee Homes* rested its findings on *other, specific* provisions of the Act, not solely

on Congress' stated intent in passing the Act. If it had, *Boyd* may have been decided differently. Indeed, in *Boyd*, the court ordered the arbitration of non-written and implied warranty claims arising under the Magnuson-Moss Act, *see Boyd*, 1997 WL 619208 at *14, even though it declined to do so for written warranties in *Waverlee Homes*. *Waverlee Homes*, 954 F. Supp. at 1537-39. Accordingly, not only are *Waverlee Homes* and *Boyd* inapplicable to the court's analysis under the TILA and the ECOA, Plaintiff is simply wrong in asserting that "[i]n both *Boyd* and [*Waverlee Homes*], the Court found that enforcement of the arbitration clause at issue would override the desires of Congress in creating the legislation," (Mot. For Recons. at 2); wrong in asserting that "there is no distinction to be drawn between [Magnuson-Moss and TILA] (*Id.* at 7); and misguided in asserting as support the fact that "all of these consumer protection statutes were passed in a relatively short period of time between 1968-1974." (*Id.*)

The court finds unpersuasive Plaintiff's assertions regarding class certification and finds it unnecessary to revisit that portion of its Order denying Plaintiff's request to certify a class. (Mot. For Recons. at 7-9.) Finally, Plaintiff requests that the court reconsider its Order enjoining Plaintiff from failing to arbitrate her claims against the Defendants. (Mot. For Recons. at 9.) Plaintiff asserts that she does not have the resources to arbitrate and that consequently her "only option . . . is to forego any claims that she may have . . . which is precisely why this defendant requires an arbitration agreement in each and every one of its contracts." (*Id.*) While mindful of the apparent inequitable result of requiring arbitration of TILA and ECOA claims and of not certifying a class, particularly in light of the consumer protection purposes of the Acts, this court finds and does not make law, and is bound by precedent and the mandates of the Eleventh

Circuit Court of Appeals and the United States Supreme Court as it reads them. When and if either the Eleventh Circuit or the Supreme Court hold that Congress intended to preclude arbitration of TILA and/or ECOA claims, or Congress expressly passes such legislation, this court will gladly modify and/or vacate its Order. Until then, it is CONSIDERED and ORDERED that Plaintiff's Motion For Reconsideration be and the same is hereby DENIED.

DONE this the 5th day of January, 1998.

/s/ [Illegible] De Ment
United States District Judge

## APPENDIX D

[Filed Oct. 28, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 98-6055 FF

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LARKETTA RANDOLPH, on behalf of herself
and all others similarly situated,
*Plaintiff-Appellant,*
versus

GREEN TREE FINANCIAL CORP.—ALABAMA; and
GREEN TREE FINANCIAL CORPORATION,
*Defendants-Appellees.*

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On Appeal from the United States District Court
for the
Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING IN BANC

Before: CARNES, Circuit Judge, and FARRIS*, Senior Circuit Judge.

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ [Illegible]
United States Circuit Judge

## APPENDIX E

### ARBITRATION AGREEMENT CONTAINED IN RETAIL INSTALLMENT CONTRACT

"17. All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgement upon the award rendered may be entered in any court having jurisdicton. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, Assignee retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a

transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgement, or to enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision."

Supreme Court, U.S.
FILED
FEB 28 2000
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(2)

No. 99-1235

IN THE
# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 S. Court Street
P.O. Box 4276
Montgomery, Alabama 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 N. Prairie Street
P.O. Box 350
Union Springs, Alabama 36089
(334) 738-4225

*Counsel for Respondent*

JOSEPH M. SELLERS *
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

* Counsel of Record

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## COUNTERSTATEMENT OF THE QUESTIONS FOR REVIEW

1. Whether the court of appeals properly held that a district court's order compelling arbitration and dismissing with prejudice the entirety of the underlying individual and class claims constitutes a "final decision" that is subject to immediate review under the Federal Arbitration Act, 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals properly held unenforceable an arbitration clause which failed to provide the plaintiff protection from the risk of bearing the costs of vindicating her statutory rights and the same opportunity to employ the class action mechanism, that would have been available under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, in a judicial forum.

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IN THE

# Supreme Court of the United States

No. 99-1235

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

### COUNTERSTATEMENT OF THE CASE

On January 25, 1994, Plaintiff Larketta Randolph purchased a mobile home from Better Cents Home Builders, Inc. Pet. App. 2a.[1] Ms. Randolph financed her purchase through Green Tree Financial Corp.—Alabama, whose financing documents required her to acquire "vendors single interest" insurance, which protects a vendor or lienholder against the costs of repossession in the case of a default on her loan. *Id.* The installment contract also contains an arbitration provision which requires that disputes "arising from or relating to" the contract be resolved through arbitration. Pet. App. 2a-3a. The arbitration agreement does not permit the pursuit of claims on behalf of a group or class of claimants. Pet. App. 48a.

[1] Petitioners' petition for a writ of certiorari in this Court is referenced herein as "Pet. ——. The appendix included with the petition is referenced herein as "Pet. App. ——."

On January 3, 1996, Ms. Randolph filed an action in the United States District Court for the Middle District of Alabama, on behalf of herself and those similarly situated, against Green Tree Financial Corp.—Alabama, Green Tree Financial Corp., and Green Tree Financial Servicing Corp. (collectively "Green Tree") for: (1) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, for failing to reveal in its TILA disclosure the "vendors single interest" requirement; and (2) violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f, for requiring Ms. Randolph to waive statutory causes of action.[2] Pet. App. 4a. The relief to which Ms. Randolph is entitled individually is estimated to be about $15.00, for the purchase of the vendors single interest. *See* Complaint, Exhibit A, *Randolph v. Green Tree Financial Corp.—Alabama*, Case No. 96-D-11-N, Pet. App. 20a (M.D. Ala. Jan. 3, 1996) (No. 1).

In response to the complaint, Green Tree filed a Motion to Stay Action and Compel Arbitration with supporting briefs and memoranda. Pet. App. 22a. At the request of the district court, on October 31, 1997, Green Tree filed a consolidated pleading—Motion of [Green Tree] to Compel Arbitration, Motion to Stay, or, in the Alternative, Motion to Dismiss and Brief in Support Thereof. *Id.* Instead of addressing the merits of Ms. Randolph's complaint, the district court focused on the enforceability of the arbitration provision in Ms. Randolph's contract. Pet. App. 22a n.3. On November 26, 1997, the district court entered an order: granting Green Tree's motion to compel arbitration; denying Green Tree's motion to stay; granting Green Tree's motion to dismiss the entire complaint *with prejudice*; dismissing Green Tree Financial Servicing Corporation as a party; and prohibiting Ms. Randolph from

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**2 Ms. Randolph filed amended complaints on December 10, 1996 and September 29, 1997. Pet. App. 22a n.3.**

adjudicating her claims in court. Pet. App. 50a. The district court also conceded that "compelling arbitration in this instance will eliminate Plaintiff's ability to arbitrate her claims on behalf of a class," Pet App. 46a, and that its order denied Plaintiff's class claims. Pet. App. 51a. While recognizing that Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, permits a court to stay the proceeding in an action and compel arbitration, the district court chose instead to dismiss all Ms. Randolph's claims with prejudice, disposing of the case in its entirety, because all the underlying claims were subject to the arbitration agreement. Pet. App. 48a-49a (citing 9 U.S.C. § 3). Ms. Randolph filed a Motion for Reconsideration on December 10, 1997, which was denied on January 5, 1998. Pet. App. 51a, 54a.

In June of 1998, Ms. Randolph noted a timely appeal of the district court's order before the United States Court of Appeals for the Eleventh Circuit. Pet. App. 5a. Green Tree moved to dismiss the appeal for want of jurisdiction. *Id.* After briefing on the merits and argument, the Eleventh Circuit reversed, holding: (1) that "the district court's judgment was an appealable 'final decision' " which conferred jurisdiction upon the Court of Appeals; and (2) that Green Tree's arbitration agreement was unenforceable against Ms. Randolph. *Id.* at 2a.

Relying on the legislative history of the FAA and on *Catlin v. United States*, 324 U.S. 229, 233 (1945), *see* Pet. App. 10a-13a, the court of appeals concluded that because the order dismissing the case left no additional issues for the district court to resolve, *see* Pet. App. 8a, the order was a final decision subject to immediate review. Pet. App. 14a-15a.

The court of appeals also held Green Tree's arbitration clause was unenforceable in this case because the clause "failed to provide the minimum guarantees required to ensure that [Ms. Randolph could] vindicate her statutory

rights under the TILA." Pet. App. 15a. While recognizing the presumption in favor of arbitration, *see id.*, the court of appeals concluded that Green Tree's arbitration provision—which was silent about the allocation of arbitration costs and fees—and evidence presented at oral argument were insufficient to ensure that Ms. Randolph would not bear any significantly greater costs going through arbitration than if she went to court. *Id.* at 17a-19a.

Green Tree sought rehearing and suggested rehearing *en banc* of the Eleventh Circuit's decision, which was denied on October 28, 1999. *See* Pet. App. 55a-56a. On January 21, 2000, Green Tree filed a Petition for Writ of Certiorari, seeking review by this Court. Pet. 1.

## REASONS FOR DENYING THE PETITION

### I. THE CASE IS AN IMPROPER VEHICLE FOR RESOLVING A CONFLICT OVER THE SIGNIFICANCE OF THE "EMBEDDED"/"INDEPENDENT" DISTINCTION IN DETERMINING THE APPEALABILITY OF A COURT ORDER COMPELLING ARBITRATION BECAUSE OF ITS UNIQUE PROCEDURAL AND FACTUAL POSTURE.

#### A. The District Court's Order Dismisssing This Case With Prejudice Puts It in a Unique Procedural Posture.

Because the district court dismissed all of Ms. Randolph's underlying claims with prejudice, rather than staying them or dismissing them without prejudice, this case is not typical of those cases where the courts of appeals have considered the appealability of an order compelling arbitration within an embedded proceeding. Unlike the other circuits which have declined to allow appellate review, the Petitioners seek certiorari under unique circumstances where the district court has disposed of all issues before it with prejudice and compelled arbitration. This case is thus an inappropriate vehicle

through which to resolve a division among the circuit courts regarding this issue.

The threshold issue over which the circuit courts conflict is whether a district court's order to arbitrate is appealable as a "final decision" under the FAA.[3] 9 U.S.C. § 16(a)(3). Section 16(a)(3) allows appeals where there has been "a final decision with resect to an arbitration that is subject to this title." While Section 16 of the FAA does not define the term "final deci-

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[3] The FAA has specified the grounds on which appeals may be taken from arbitration rulings by district courts. Section 16 of the FAA states:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting, or vacating an award;
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
>
> (3) a final decision with respect to an arbitration that is subject to this title.
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that it subject to this title.

9 U.S.C. § 16.

sion," it has been well established for over half a century that appeals are available when the district court disposes of the issues before it in their entirety. *See Catlin*, 324 U.S. at 233 (defining "final decision" for purposes of appeal under section 128 of the Judicial Code). Indeed, this Court has held that a decision of the district court is final if it "ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 233. Consistent with this well-established doctrine, the Eleventh Circuit interpreted the FAA's term "final decision" by looking to the "simplest traditional definition of finality: [whether] the decision has disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order." Pet. App. 10a (citing 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.17 at 18-19 (2d ed. 1992)). *See also Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (holding that appellate jurisdiction exists over an order compelling arbitration in an embedded proceeding because district court had entered final judgment and had no other role than to "execute the judgment") (citing *Catlin*, 324 U.S. at 233); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995) (holding that court of appeals had jurisdiction from district court's dismissal of plaintiffs' remaining claims with prejudice, because it was an appealable final decision).

It is over this issue of when a district court's order compelling arbitration under the FAA is final, that the circuit courts conflict. Several circuits have held that where a proceeding is "independent" (*i.e.*, where "the motion to compel arbitration . . . is the only claim before the district court") a final judgment ending such litigation is appealable immediately. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994); *see also Filanto S.p.A. v.*

*Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). Other circuits have held that where a proceeding is "embedded" (*i.e.*, where the "arbitration issue arises as part of a broader action dealing with other issues"), that an order compelling arbitration must be treated as *de facto* interlocutory and nonappealable, not as a final decision under Section 16(a)(3). *See* Pet. App. 7a. *See also John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir., 1997), *cert. denied*, 119 S. Ct. 275 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto*, 984 F.2d at 60-61.

The circumstances that give rise to the division among the circuit courts, however, do not obtain here. Because the district court dismissed the plaintiff's claims in their entirety *with prejudice*, *see* Pet. App. 48a-49a, and did not stay the action or dismiss it without prejudice, the procedural posture of this case is far different from the majority of cases that have addressed the availability of review of an order compelling arbitration.[4] Unlike the other circuit

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[4] In general, there are two different courses of action a district court may take when ordering arbitration in an embedded arbitrability proceeding. In the majority of cases, the district court stays the case pending the outcome of arbitration in order to retain jurisdiction. *See Napleton*, 138 F.3d at 1212. In those situations, the order compelling arbitration is interlocutory, and therefore not final. *See Prudential*, 42 F.3d at 1302. In other instances, however, the district court dismisses the entire case with-

court decisions upon which the Petitioners rely, Pet. 14-19, the Eleventh Circuit's determination that the district court's order was a final decision, and thus immediately appealable, was based substantially on the action of the district court dismissing all the underlying claims with prejudice.[5] *See* Pet. App. 14a. This is a feature that is not present in the cases decided by circuits relying on the embedded/independent distinction. *See* Pet. App. 14a ("The opinions in those cases either involved dismissals without prejudice or did not clearly state the nature of the dismissal."). Indeed, in two circuits which denied review of orders compelling arbitration, the courts expressly reached that decision because, unlike the present case, the underlying case had been dismissed *without prejudice*. *See Napleton*, 138 F.3d at 1212 (stating that the issue before them was "whether, in the context of an embedded proceeding, *a dismissal without prejudice* 'to allow for arbitration' constitutes an appealable—*i.e.* final—decision.") (emphasis added); *Filanto*, 984 F.2d at 61 n.3 (theorizing that "[h]ad the complaint been dismissed, it is arguable that an appeal would be immediately available . . . .").

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out prejudice at the time it compelled arbitration. It is in this context—where claims are dismissed *without* prejudice in an embedded proceeding—that the majority of circuits have declined to find appellate jurisdiction. *See e.g., Napleton*, 138 F.3d at 1214 finding no jurisdiction where district court dismissed case without prejudice); *Seacoast*, 143 F.3d at 628-29 (same); *McCarthy*, 143 F.3d at 1245 (same); *Filanto*, 984 F.2d at 61 (finding no jurisdiction where district court did not dismiss complaint and stayed case pending arbitration).

[5] The Eleventh Circuit stated below that "'[a] dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute judgment.'" Pet. App. 14a (citing *Morewitz v. West of England Ship Owners Mut. Protection & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1361 (11th Cir. 1995) (quoting *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. Unit B 1982))). This procedural distinction is critical and thus the case below does not present squarely the procedural situation over which the circuits conflict.

Accordingly, the unique procedural posture of this case makes it an inappropriate vehicle through which to resolve this circuit split.

**B. This Case, Brought Below as a Class Action, Is Not a Proper Vehicle for Deciding Whether Appellate Courts Have Jurisdiction Over Appeals Within Embedded Proceedings.**

Ms. Randolph filed the action below on behalf of herself and others similarly situated. Pet. App. 4a. The district court dismissed Ms. Randolph's individual claims and the claims brought on behalf of a class and compelled arbitration of Ms. Randolph's individual claims. Pet. App. 4a-5a. The review of the ruling allowing an immediate review of the order compelling arbitration would inevitably call into question the consequences for members of the putative class if such an immediate appeal were unavailable. These difficult issues would encumber this case, making it far from ideal for review.

Certiorari should be denied where there are procedural or factual irregularities in the underlying case that make it atypical of those in which the issue for review may normally arise. This case is factually atypical because it arose from a case styled as a class action. Pet. App. 4a. Because the compelled arbitration at issue does not allow for class claims, the dismissal of the class complaint denied putative class members the opportunity to proceed in a collective fashion. *See* Pet. App. 46a. The majority of cases in which the issue of appellate jurisdiction over district court orders compelling arbitration have arisen, have been proceedings brought by individuals seeking to vindicate their own individual interests. *See e.g.*, *Napleton*, 138 F.3d at 1210 (7th Cir.); *Olick*, 151 F.3d at 134-35 (3d Cir.); *Seacoast*, 143 F.3d at 627 (1st Cir.); *Pisgah*, 117 F.3d at 134 (4th Cir.); *Altman*, 84 F.3d at 770 (5th Cir.); *Armijo*, 72 F.3d at 795-96 (10th Cir.);

*Filanto*, 984 F.2d at 59-60 (2d Cir.); *Humphrey v. Prudential Ins. Co.*, 4 F.3d 313, 314 (4th Cir. 1993); *Arnold*, 920 F.2d at 1270 (6th Cir.). *But see McCarthy*, 122 F.3d at 1243 (9th Cir.) (class action context); *Gammaro*, 15 F.3d at 95 (8th Cir.) (same); *Perera v. Siegal Trading Co.*, 951 F.2d 780, 781 (7th Cir. 1992) (same).

Because this case implicates absent class members' rights and their ability to bring suits, review of this case will raise other issues than simply the conflict among the circuits over the meaning of "final decision" pursuant to the FAA. Should the Court grant certiorari in this case to determine whether an appellate court has jurisdiction pursuant to Section 16(a)(3) to review a district court order compelling arbitration in an embedded proceeding, even where the case has been dismissed with prejudice, the Court will also be faced with additional issues relating to the denial of a forum in which putative class members could pursue their claims collectively.

In addition, as discussed more fully, *infra* Section III, should the Court decide to review the exercise of appellate jurisdiction over the case below, enforcement of the arbitration clause could have the effect of denying to the vast majority of putative class members the opportunity to vindicate their rights under TILA. In fact, the district court below conceded that "[i]t is true that compelling arbitration in this instance will eliminate Plaintiff's ability to arbitrate her claims on behalf of a class." Pet. App. 46a. The operation of an arbitration clause that precludes a class action would impair the enforcement scheme of TILA. As such, this collateral consequence of enforcing such an arbitration clause would raise other issues not implicated in the vast majority of cases in which the review of an order compelling arbitration arises. This Court has been mindful to allow appeals of district courts'

rulings on certification issues so as not to "frustrate the objectives of class actions . . . ." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Using this case as the vehicle for resolving the circuit split over the significance of the embedded/independent distinction in determining the appealability of an order compelling arbitration, could potentially frustrate the bringing of a TILA claim as a class action. Such factual irregularities caution against the propriety of granting certiorari in this instance.

## II. THERE IS NO CIRCUIT SPLIT OVER THE ENFORCEABILITY OF AN ARBITRATION PROVISION WHICH IS SILENT ABOUT THE ALLOCATION OF ARBITRATION FEES AND COSTS.

Petitioners argue that this case concerns important federal law concerns about arbitrability upon which the circuit courts are divided. Pet. 23. However, there is no split among the circuit courts as to what constitutes the proper approach when determining the enforceability of an arbitration agreement. The United States courts of appeals, including the Eleventh Circuit, have uniformly embraced the strong federal policy favoring arbitration and the presumption which exists in its favor when making arbitrability determinations.[6] The Eleventh Circuit's holding that Green Tree's arbitration agreement is un-

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[6] *See e.g., KKW Enters. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49 (1st Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 384 (4th Cir. 1998); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998); *Napleton*, 138 F.3d at 1214 (7th Cir.); *Fleet Tire Serv. of North Little Rock, Inc. v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997); *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996); *Armijo*, 72 F.3d at 797 (10th Cir.); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991); *Wiepking v. Prudential-Bache Sec., Inc.*, 940 F.2d 996, 998 (6th Cir. 1991); *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987).

enforceable because it is silent about the allocation of arbitration fees and costs—thereby creating a risk that Ms. Randolph will bear the heavy costs of arbitration and discourage her from pursuing her TILA claims altogether —in no way veers from this fundamental approach.

### A. Arbitration Agreements, Like Other Contracts, May Be Unenforceable Where They Undermine a Plaintiff's Ability to Protect Important Federal Statutory Rights.

Arbitration agreements are contracts and must be interpreted in the same manner as contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (FAA "place[d] arbitration agreements on the *same* footing as other contracts.") (emphasis added). While arbitration may be a favored forum, arbitration agreements are not to be given *more* preference than other contracts. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (purpose of FAA was to make "arbitration agreements as enforceable as other contracts, but not more so"). Furthermore, not all statutory claims are appropriate for arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985), and "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Gilmer*, 500 U.S. at 26. Where a plaintiff demonstrates that there is an "inherent conflict" between arbitration and the statute's underlying purposes, an arbitration agreement may be unenforceable. *Gilmer*, 500 U.S. at 26; *see also Paladino*, 134 F.3d 1062 ("When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable.").[7]

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[7] Similarly, in *Shankle v. B-G Maintenance Management of Colorado, Inc.*, the Tenth Circuit stated:

> As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which

### B. The Decision to Deny Enforcement of the Arbitration Clause Follows Well-Accepted Federal Principles Upon Which There Is No Disagreement.

The Eleventh Circuit's determination that Green Tree's arbitration provision was unenforceable follows well-established federal principles, over which there is no circuit conflict appropriate for this Court's review. Contrary to Petitioners' characterizations, *see* Pet. 10, the Eleventh Circuit is not hostile to the FAA or to arbitration. But, a presumption in favor of arbitration does not preclude review of the propriety of arbitration in particular circumstances. While acknowledging the general presumption in favor of arbitration, the Eleventh Circuit decided that arbitration was not appropriate in this case because the costs and fees associated with arbitration could impose an overwhelming burden on Ms. Randolph. Pet. App. 15a-19a. Where an agreement compels arbitration on terms materially more burdensome than those that would be present if a party sought relief in court, the agreement effectively prohibits that party from enforcing her statutory rights. *See* Pet. App. 15a-16a; *see also Paladino*, 134 F.3d at 1062; *Shankle*, 163 F.3d at 1234 n.3. Here, the Eleventh Circuit found that arbitration would potentially impose costs and fees upon Ms. Randolph that would not normally be borne by her in a judicial forum, creating the substantial risk that Ms. Randolph would be financially deterred from enforcing her rights under TILA altogether. Pet. App. 16a-19a.

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> to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.
>
> 163 F.3d 1230, 1234 (10th Cir. 1999).

While the arbitration agreement did not expressly impose the substantial costs of arbitration on Ms. Randolph, its silence on the allocation of such costs created at the very least a risk that she would bear such costs. *See* Pet. App. 17a-19a. Since Green Tree drafted the arbitration clause, ambiguity in the agreement was, and should have been, assessed against its interests. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) ("Respondents drafted an ambiguous [arbitration] document, and they cannot now claim the benefit of the doubt."); *United States v. Seckinger*, 397 U.S. 203, 210 (1970). The Eleventh Circuit has done no more than hold Green Tree's arbitration agreement unenforceable because it failed to delineate how fees and costs would be allocated among the parties, creating an unacceptable risk to Ms. Randolph that her efforts to enforce her statutory rights would impose unaffordable costs on her. In conformance with well-accepted federal principles, the Eleventh Circuit properly barred enforcement of such an agreement.

### C. Other Circuit Decisions Are Consistent With the Approach Taken by the Eleventh Circuit.

No conflict in the circuits exists over what constitutes the appropriate approach in determining the enforceability of an arbitration clause that fails to ensure the same fees and costs allocation as would be available in a judicial forum. If anything, other circuits which address arbitration clauses that have been silent on the applicability of statutorily created rights are in accord with the approach taken by the Eleventh Circuit.[8] When interpreting the enforceability of an arbitration agreement which was silent about the scope of the

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[8] *But see, Cole v. Burns Int'l Sec. Servs., Inc.*, 105 F.3d 1465 (D.C. Cir. 1997).

claims covered, for example, the First Circuit concluded that the agreement's drafter, rather than the party challenging the agreement, should bear the risk of silence and ambiguity. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 & n.16 (1st Cir. 1999). Notwithstanding the presumption in favor of arbitrability,[9] the First Circuit concluded that the agreement was unenforceable because the drafter failed to make clear that employment claims were included within the scope of covered claims. *Rosenberg*, 170 F.3d 1, 17-19. Rather than present a conflict, as Petitioners argue, *Rosenberg* demonstrates the uniformity of the circuit courts in their approach to determining arbitrability where an arbitration clause is ambiguous.

Most authorities on which the Petitioners rely to suggest a split in the circuits either fail to address how silence in arbitration agreements should be treated or are easily distinguishable. *See* Pet. 25-29. For example, in *Koveleskie v. SBC Capital Markets, Inc.* 167 F.3d 361 (7th Cir. 1999), the Seventh Circuit had no occasion to interpret an arbitration provision that was silent about fees and costs. There, the court simply held that the prospect of a plaintiff bearing a share of fees in arbitration in the securities industry—where most plaintiffs did not bear such costs—did not preclude the arbitration of a claim arising under Title VII of the Civil Rights Act of 1964. *Koveleskie*, 167 F.3d at 364-66.

Similarly, *Dobbins v. Hawk's Enterprises*, 198 F.3d 715 (8th Cir. 1999), upon which the Petitioners also rely, has no bearing on the enforceability of an arbitration agreement which is silent about such costs. While the Eighth

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[9] In *Rosenberg*, the First Circuit recognized, not only the presumption in favor of arbitrability under the FAA, but also under the Civil Rights Act of 1991, and still found the arbitration agreement unenforceable. *Rosenberg*, 170 F.3d at 10, 18-19.

Circuit addressed the allocation of arbitration costs in *Dobbins*, the court, however, simply recognized that the potential of high arbitration costs on a plaintiff could make an arbitration agreement unconscionable, and it recognized that unconscionability determinations must be made on a "case-by-case basis" in accordance with state law. *Dobbins*, 198 F.3d at 717 (noting "courts across the country" share same concern). Because the *Dobbins* plaintiffs failed to exhaust the procedures available to them to waive or reduce the arbitration fees, the Eighth Circuit concluded that it could not make an unconscionability determination, and remanded the case. *Id.*

In sum, the Petitioners have failed to demonstrate a circuit split over the approach taken to determine the enforceability of an arbitration agreement which fails to specify how arbitration fees and costs will be allocated among the parties.[10]

## III. THE ELEVENTH CIRCUIT'S DECISION WAS CORRECT ON THE MERITS.

Although the merits are not directly at issue here, the Eleventh Circuit's decision is soundly based and therefore does not warrant review.

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10 Contrary to the Petitioners' assertion, Pet. 24-25, there is no federal circuit split over the enforceability of Green Tree's arbitration provision and to the extent any difference exists between the Eleventh Circuit and the Alabama State Supreme Court, it does not involve the protection of federal statutory rights. In *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 182-84 (3d Cir. 1999), the Third Circuit merely held that the arbitration agreement was enforceable because there was no lack of mutuality or unconscionability, neither of which issues are before this Court. The state court decisions upholding Green Tree's arbitration provision are based exclusively on the interpretation of state contract law or do not present a situation in which the federal policy in favor of arbitration must be counterbalanced with a court's obligation to protect a plaintiff's federal statutory rights. *See Green Tree Fin. Corp. v. Wampler*, No. 1970983 1999 WL 667292 at *6 (Ala. Aug. 27, 1999).

### A. The Eleventh Circuit Properly Found That the District Court's Decision to Dismiss the Case With Prejudice Was a Final Decision, Warranting Immediate Review.

The Eleventh Circuit correctly relied on this Court's interpretation of the term "final decision" in *Catlin* in construing the availability of appellate review pursuant to Section 16(a)(3) over orders dismissing a case with prejudice and compelling arbitration. *See* Pet. App. 10a (citing *Catlin*, 324 U.S. at 233). The court of appeals noted that while a number of circuits have "adhered, with a concededly 'myopic[]' focus, to the embedded/independent distinction in determining whether they had jurisdiction to hear an appeal under § 16(a)(3)," Pet. App. 8a (citing *Napleton*, 138 F.3d at 1213), nothing in the plain language of the FAA requires the courts to make such a distinction decisive. *See* Pet. App. 11a. Instead, the court was informed by the definition of "final decision" which was of long-standing when Congress enacted Section 16(a)(3), rather than be guided by the same degree of "talismanic significance," *Napleton*, 138 F.3d at 1211, that other circuits placed on the difference between independent and embedded proceedings. *See* Pet. App. 10a.

Where the district court's dismissal with prejudice leaves nothing for the court to resolve, as occurred below, the distinction between embedded and independent proceedings makes little sense. There is no risk of piecemeal appeals where the district court has decided all the issues before it with prejudice. *See Catlin*, 324 U.S. at 233 (stating that the definition of finality is one where there is "nothing for the [district] court to do but execute the judgment"). Accordingly, the order compelling arbitration was a final decision susceptible of immediate appellate review.

**B. Given the Failure to Protect the Plaintiff From the Costs of Arbitration and the Unavailability of the Class Action Mechanism Under Green Tree's Arbitration Agreement, the Court of Appeals Was Correct to Hold the Agreement Unenforceable.**

The Eleventh Circuit was correct in precluding the enforcement of an arbitration clause that did not make clear the allocation of costs associated with arbitration. Accordingly, review of that decision is unwarranted. It was clear that Congress intended persons aggrieved by practices prohibited by TILA, who have meritorious claims, would have their costs paid by the defendant. *See* 15 U.S.C. § 1640(a)(3).[11] As the Eleventh Circuit recognized in considering the enforcement scheme established by Congress:

> The award of attorney's fees, as a practical matter, is a critical and integral part of this plan. In order to effectuate this scheme, attorneys who bring TILA cases should be secure in their expectation of fees from a successful action and should be able to pursue their right to fees in federal court. . . . [Where] creditors who have violated the Act [could] escape liability for attorney's fees . . . such a practice would thwart both the statute's private enforcement scheme and its remedial objectives.

*James v. Home Const. Co.*, 689 F.2d 1357, 1359 (11th Cir. 1982) (regarding settlement). A failure to guarantee that a successful plaintiff be spared the costs of arbi-

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[11] In particular, TILA states:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—
>
> . . . .
>
> (3) in the case of any successful action to enforce the foregoing liability . . . , the costs of the action, together with a reasonable attorney's fee as determined by the court . . . .

15 U.S.C. § 1640(a)(3).

tration would put in jeopardy a substantive right that was guaranteed by Congress. As such, the Eleventh Circuit wisely declined to enforce an arbitration clause that could have undermined TILA's enforcement scheme.

Furthermore, had the district court's order compelling arbitration been upheld, Ms. Randolph would have been deprived of the opportunity to pursue the class claims advanced below because Green Tree's arbitration clause failed to provide for any means of proceeding collectively. Such denial of an opportunity to pursue a class action would have deprived Ms. Randolph and other similarly situated individuals access to class treatment under Rule 23 of the Federal Rules of Civil Procedure and undermined an enforcement mechanism under TILA that Congress expressly endorsed. While the Eleventh Circuit never reached the issue of whether Green Tree's arbitration clause was unenforceable because it precluded a class action, the decision to deny enforcement may nevertheless be sustained on this alternative ground.[12]

In enacting TILA, Congress clearly contemplated that the statute could be enforced on behalf of a class. The statutory language makes clear reference to an individual's ability to bring a class action. *See* 15 U.S.C. § 1640 (a)(2)(B).[13] The legislative history reveals the strong

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[12] This issue was fully briefed before the Eleventh Circuit. *See* Brief of Appellant, Pet. App. 1a (Docket entry dated July 15, 1998); Appellant's Motion to Allow Filing of Supplemental Authority and Notice of Filing Supplemental Authority, Pet. App. 1a (Docket entry dated Sept. 15, 1999); Reply Brief of Appellant, Pet. App. 1a (Docket entry dated Aug. 17, 1998). Therefore, it is appropriate to raise this alternative ground. *See Langnes v. Green*, 282 U.S. 531, 538 (1931).

[13] The Act provides in pertinent part:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is

Congressional endorsement of a class action as an important vehicle for enforcing the statute. In particular:

> The Committee believes that the present ambiguities and uncertainties with respect to class action suits under Truth in Lending should be clarified. Moreover, the Committee agrees with the Federal Reserve Board that 'potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosures' and that such remedies should not be restricted to actual damages.

*Bantolina v. Aloha Motors*, 419 F. Supp. 1116, 1120 (D. Haw. 1976) (citing S. Rep. No. 93-278, at 14-15 (1973)). In enacting the 1974 amendments to TILA, Congress recognized:

> [t]he possibility of class-action exposure is essential to the prophylactic intent of the Act, and is necessary to elevate truth-in-lending lawsuits from the ineffective nuisance category to the type of suit which has enough sting to insure that management will strive with diligence to achieve compliance.

*Bantolina*, 419 F. Supp. at 1120 & n.12 (citing Federal Reserve Board, 1972 Annual Report on Truth in Lending (1972), *cited in* 119 Cong. Rec. 25415 (1973) (state-

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liable to such person in an amount equal to the sum of—

. . . .

(B) *in the case of a class action*, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in *any class action or series of class actions* arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 of 1 per centum of the net worth of the creditor . . . .

15 U.S.C. §1640(a)(2)(B) (emphasis added).

ment of Mr. Moss)). Plainly, the class action mechanism is integral to the enforcement of TILA.

Precluding Ms. Randolph from bringing a class action would have a profound effect on similarly situated individuals whose claims were covered by the complaint. Absent class treatment, each person aggrieved by Green Tree's arbitration clause would be required to arbitrate his or her own claim. The imposition of potentially prohibitive costs, as well as the limited financial recoveries likely to be obtained by each individual, make it extremely unlikely that many, if any, individuals would vindicate their rights through arbitration. Having been denied access to the courts, these individual claimants would be effectively denied an opportunity to vindicate their rights under TILA at all. *See McCarthy*, 122 F.3d at 1249 (Pregerson, J., dissenting) (enforceability of arbitration agreement would have done "more than close the door on federal court proceedings; it [would have] effectively sound[ed] a death knell for the entire action."). As this Court has well recognized, the class action device is designed to permit the collective prosecution of the very kind of claims that were brought below:

> [W]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

*Roper*, 445 U.S. at 339; *see also Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Thus, the Eleventh Circuit correctly held unenforceable an arbitration provision which precluded persons aggrieved under TILA from pursuing their rights as a class.

## CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 S. Court Street
P.O. Box 4276
Montgomery, Alabama 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 N. Prairie Street
P.O. Box 350
Union Springs, Alabama 36089
(334) 738-4225

JOSEPH M. SELLERS *
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

*Counsel for Respondent*

* Counsel of Record

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No. 99-1235

IN THE
# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF OF PETITIONERS

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

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## REPLY BRIEF OF PETITIONERS

In their petition, Green Tree Financial Corp.—Alabama and Green Tree Financial Corporation demonstrated that review by this Court was necessary to resolve a deep conflict among the circuits regarding whether, under 9 U.S.C. § 16(a)(3) ("Section 16(a)(3)") of the Federal Arbitration Act ("FAA"), they have jurisdiction to review a district court's dismissal of a case in favor of arbitration. Pet. 12-13, 14-22. Further, petitioners showed that the decision below holding that the arbitration provision was unenforceable because it was "silent" on the issue of costs and fees was in direct conflict with decisions of this Court and the courts of appeals. *Id.* at 13-14, 23-29. Respondent's Opposition calls none of these reasons for granting certiorari into question.

First, respondent acknowledges, Opp. 6-7, that there is a deep conflict among the courts of appeals as to the proper interpretation of Section 16(a)(3). Moreover, contrary to her arguments, this case squarely presents that conflict because courts of appeals adopting the majority standard ignore the "label" chosen by the district court and dismiss embedded proceedings like the one for lack of appellate jurisdiction. By contrast, under the minority standard, the Eleventh Circuit held that it could exercise jurisdiction. Second, as to the enforceability of the arbitration agreement, respondent concedes that the decision below conflicts with the D.C. Circuit, *id.* at 14 n.8, and her efforts to distinguish decisions by the First, Seventh and Eighth Circuits merely underscore the extent of the conflict and the need for review by this Court. Finally, respondent's effort to litigate the merits of these questions, *id.* at 17-22, is not relevant to the issue of certiorari, and, in any event, is wrong. In short, the petition presents two important and recurring questions of federal law that have generated conflicts among the courts of appeals and warrant final resolution by this Court.

1. Respondent agrees that (1) the courts of appeals are deeply divided regarding the proper interpretation of Section 16(a)(3), Opp. 6; (2) two competing legal frameworks for deciding this jurisdictional issue have developed, *id.* at 6-7; (3) the Eleventh Circuit below fully recognized and considered the conflict among the courts of appeals, *id.* at 8; and (4) the Eleventh Circuit rejected the embedded/independent framework adopted by the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits, *id.* at 6-7, and instead embraced the minority view held by the Sixth and Tenth Circuits, *id.* at 6. Further, respondent does not and cannot dispute that this conflict presents an important and recurring federal question that warrants review by this Court.

Instead, respondent asserts that this case is "an improper vehicle for resolving [this] conflict," Opp. 4, because the district court's dismissal "*with prejudice*" makes the decision below "*far different* from the majority of cases that have addressed the availability of review of an order compelling arbitration," *id.* at 7 (second emphasis added). Similarly, respondent maintains that review is unwarranted because her case involved a putative class action and therefore this Court would be "encumber[ed]" by questions regarding "consequences for members of the putative class if such an immediate appeal were unavailable." *Id.* at 9. Neither argument provides any basis for denying review because the "distinctions" seized upon by respondent have no bearing on the circuit conflict or this Court's ability to resolve it.

a. Contrary to respondent's principal argument, the "procedural posture" of this case makes it an ideal vehicle to resolve the issue of appellate jurisdiction under Section 16(a)(3). First, the Eleventh Circuit, in language that respondent studiously avoids, made clear that its rejection of the majority embedded/independent framework was outcome determinative:

> [I]f we followed the other circuits (save the Sixth and Tenth) and attached excessive significance to the "embedded" versus "independent" proceeding distinction, . . . *we* [*would*] *lack jurisdiction here.*

Pet. App. 11a (emphasis added). That is, the court of appeals expressly recognized that its adoption of the minority rule—and not the label affixed to the dismissal by the district court—was the basis for its decision in this case. *Id.* Indeed, although it noted that the district court dismissed this case "with prejudice," *id.* at 14a, the Eleventh Circuit quickly acknowledged that dismissals *without* prejudice (like dismissals *with* prejudice) are " 'appealable' " as a general matter. *Id.* at 14a n.5 (quoting *Grayson* v. *K Mart Corp.*, 79 F.3d 1086, 1094 n.7 (11th Cir. 1996)).[1] Simply put, the "nature" of the dismissal had no bearing on the decision below.

Second, the label affixed to the district court's dismissal also is irrelevant to the decisions by the courts of appeals adopting the embedded/independent framework. As the Eleventh Circuit explained, courts of appeals adopting the majority rule often do "not clearly state the nature of the dismissal." Pet. App. 14a; see, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 627 (1st Cir. 1998) (district court dismissed case "with costs"); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir. 1997) (district court "decided to dismiss, rather than stay, the action"). The fact that circuits adopting the majority embedded/independent approach do not emphasize "the nature of the dismissal" is not surprising because these circuits do not consider this factor relevant to the jurisdictional question. For example, in the Fifth Circuit, an order compelling arbitration in "an embedded

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[1] *See also United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) ("That the dismissal was without prejudice . . . does not make the cause unappealable."); 15A Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.6, at 533 (2d ed. 1992) ("[D]ismissal without prejudice is appealable." (citing cases)).

proceeding is *always* an interlocutory order." *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) (emphasis added). Similarly, in the Eighth and Fourth Circuits " 'an embedded proceeding may not give rise to a final decision subject to section 16(a)(3) review, *even when all the claims in which the arbitration issue is embedded are resolved.*' " *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (emphasis added) (quoting *Humphrey* v. *Prudential Sec. Inc.*, 4 F.3d 313, 318 (4th Cir. 1993)). To the same effect are the holdings of the First and Seventh Circuits which have concluded that " 'it is the nature of the underlying action, *not the style of the district court's decision requiring arbitration*, that determines whether we have jurisdiction over appeals from decisions granting arbitration.' " *Seacoast Motors*, 143 F.3d at 629 (emphasis added) (quoting *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998)). In sum, under the majority rule, the only question that is relevant to determining appellate jurisdiction under Section 16(a)(3) is whether the proceeding was embedded or independent because an order compelling arbitration in an embedded proceeding is not appealable "regardless of the terminology used by the trial court." *McCarthy*, 122 F.3d at 1245.

As a result, respondent is simply wrong to argue that the district court's dismissal "with prejudice" makes this case "far different from the majority of cases that have addressed the availability of review of an order compelling arbitration," Opp. 7. Respondent fails to explain how this case would be different in any material respect if the dismissal were designated "without prejudice." Indeed, the decisions adopting the majority position have explained that such distinctions are of no moment because allowing the " 'style of the district court's decision' " to control the issue of appellate jurisdiction would "elevat[e] form over substance," *Seacoast Motors*, 143 F.3d at 629. and "leave the jurisdictional trump card in the hand of

the district court," *Napleton*, 138 F.3d at 1213. As the *McCarthy* court noted, Congress could not have intended that appellate jurisdiction would turn on the "terminology used by the trial court." 122 F.3d at 1245.

In the end, if this case had been decided by one of the courts of appeals that has adopted the majority standard, it would have been dismissed for lack of jurisdiction. Because it was decided in a circuit applying the minority rule, however, the Eleventh Circuit ruled that it had jurisdiction. Accordingly, this case is an ideal vehicle to resolve this undisputed and well-developed circuit conflict.

b. Similarly baseless is respondent's claim that review should be denied because the class allegations advanced in respondent's Second Amended Complaint "would encumber this case, making it far from ideal for review." Opp. 9. First, respondent provides absolutely no support for the proposition that courts of appeals can or should adopt different interpretations of Section 16(a)(3) depending on whether a plaintiff has brought suit (1) on her own behalf, or (2) on her own behalf, as well as for a putative class that has never been certified. Although she correctly notes that some of the cases creating this circuit conflict have involved "individual" suits, *id.* at 9, respondent quickly concedes that others involved putative class actions, *id.* at 10 (citing decisions by the Seventh, Eighth and Ninth Circuits). What respondent never acknowledges, however, is that none of these cases concluded or implied that the existence of class allegations had any bearing on their interpretation of Section 16(a)(3).

Nor does respondent provide any plausible reason that class actions should be treated separately for purposes of Section 16(a)(3). Rather, she argues that review of the jurisdictional issue "would inevitably call into question the consequences for members of the putative class if such

an immediate appeal were unavailable." Opp. 9.[2] To the extent that respondent is concerned that an adverse ruling would have a res judicata or collateral estoppel effect on putative class members, that fear is unfounded because the district court "declined to certify a class." Pet. App. 4a; see also 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4455, at 475-76 (1981) ("The most obvious limitation" on the doctrine of "[p]reclusion by class action representation" is "there must actually have been a class action."). To the extent she is concerned that the "putative class" members, and litigants nationwide, would be bound by a decision announcing a uniform national standard and therefore could no longer forum shop for a more favorable standard, that *concern* is, in fact, precisely the reason certiorari is appropriate in this case. See Sup. Ct. R. 10(a).

2. As to the enforceability of the arbitration agreement, respondent admits that the decision below conflicts with *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), Opp. 14 n.8, but nevertheless maintains that "there is no split among the circuit courts as to what constitutes the proper approach when determining the enforceability of an arbitration agreement," *id.* at 11. Similarly, while respondent acknowledges that "the arbitration agreement did not expressly impose the substantial costs of arbitration on Ms. Randolph," *id.* at 14, she steadfastly insists that the court of appeals' conclusion that such "silence" should be resolved *against* arbitration "in no way veers from" the "strong federal policy *favoring* arbitration and the presumption which exists in its *favor* when making arbitra-

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[2] Indeed, the support for her statement that "[t]his Court has been mindful to allow appeals of district courts' rulings on certification," Opp. 10-11, is a case that confirms that class certification issues do "not fall within that narrow category of circumstances where appeal [is] allowed prior to final judgment as a matter of right." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 n.8 (1980) (citing *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978)).

bility determinations." *Id.* at 12, 11 (emphases added).[3] Certiorari should be granted independently because the decision below conflicts with that of other circuits which have applied the strong federal presumption in favor of arbitration and imposed the burden of proof on the party seeking to avoid arbitration.

Petitioners previously showed, Pet. 25-26, that the decision below conflicts with *Cole* v. *Burns International Security Services*. There, the D.C. Circuit upheld the enforceability of an arbitration agreement in the face of "silen[ce]" as to which party would bear the costs of arbitration, 105 F.3d at 1485-86, by interpreting it to require the employer "to pay all arbitrators' fees in connection with the resolution of the [employee's federal statutory] claims," *id.* at 1486. The *Cole* court adopted that interpretation "to uphold the validity of the parties' contract." *Id.* Although respondent never discusses *Cole*, she acknowledges, in a footnote, that *Cole* refutes her claim that "other circuits . . . are in accord with the approach taken by the Eleventh Circuit." Opp. 14 & n.8.

Recognizing that the decision below conflicts with *Cole*, respondent maintains, on the merits, that the Eleventh Circuit was correct to rule against arbitration because "ambiguity in the agreement" should be resolved against the drafter. Opp. 14 (citing *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995)). But *Mastrobuono* made clear that federal law requires that "ambiguities" in arbitration agreements be " 'resolved in favor of arbitration.' " 514 U.S. at 62 (interpreting ambiguous agreement against drafter *and* in favor of arbitration). Similarly, in *Cole*, the D.C. Circuit resolved ambiguity *against* the drafter but in *favor* of arbitration by requiring the employer who drafted the arbitration agreement to pay arbitration fees so that the arbitration

[3] Lacking any record evidence, respondent peppers her argument with allegations of "heavy" and "unaffordable" costs that would impose an "overwhelming burden" on respondent. Opp. 12-14.

agreement could be upheld. 105 F.3d at 1486. In stark contrast, the Eleventh Circuit ignored the federal command in *favor* of arbitration, and instead resolved "ambiguity" *against* arbitration. Pet. App. 17a-18a.

Moreover, respondent's efforts to distinguish conflicting circuit decisions do not withstand scrutiny. In *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15 (1st Cir. 1999), plaintiff claimed that an arbitration agreement violated federal law because arbitrators refused "to award statutory attorneys' fees" and imposed "forum fees" on plaintiffs as high as "tens of thousands of dollars per case." *Id.* The *Rosenberg* court rejected that argument, concluding that (1) the arbitration agreement "d[id] not limit available relief" that could be awarded, (2) plaintiff failed to support the claim "that a plaintiff is asked to bear forum fees," and (3) "if unreasonable fees were to be imposed on a particular employee," then the argument that this result violated federal statutory rights "could be presented . . . to the reviewing court." *Id.* at 15-16. The decision below conflicts directly with each of these rulings.

First, nothing in petitioners' arbitration agreement prevents the arbitrator from waiving costs or awarding attorneys' fees to a prevailing party.[4] Unlike *Rosenberg*, the Eleventh Circuit, however, ruled that "silence" must be resolved *against* arbitration. Pet. App. 17a. Second, respondent failed to establish that costs or attorneys' fees would be borne by her. *Id.* at 17a-18a. Unlike *Rosenberg*, however, this complete failure of proof redounded to the benefit of respondent, the party seeking to invalidate the arbitration agreement. Finally, respondent would be entitled to challenge any costs or fees imposed by the

[4] The agreement provides that "the arbitrator shall have all powers provided by the law and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Pet. App. 57a.

arbitrator after the arbitration. See 9 U.S.C. § 10. Unlike *Rosenberg*, the Eleventh Circuit ignored that avenue for relief when it ruled that the risk that respondent "might" be required to bear the "costs of arbitration" was enough to invalidate the parties' agreement. What is more, the Seventh Circuit has adopted the analysis from *Rosenberg* to hold that a party's allegations regarding costs and fees did not render an arbitration agreement unenforceable. *Koveleskie* v. *SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).[5] In short, the decision below fundamentally conflicts with the decisions of the First Circuit in *Rosenberg* and the Seventh Circuit in *Koveleskie*.

Finally, respondent misreads *Dobbins* v. *Hawk's Enterprises*, 198 F.3d 715 (8th Cir. 1999). Opp. 16. In *Dobbins*, the Eighth Circuit ruled that plaintiffs were required to minimize their fees *and*, if those efforts failed, to accept defendant's offer to "pay the arbitration fees." 198 F.3d at 717. In doing so, the *Dobbins* court resolved doubts *against* claims of unconscionable arbitration fees "to foster the policy in favor of arbitration." *Id.* In contrast, the Eleventh Circuit had no evidence of any fees, but nevertheless ruled that its self-imposed doubts should be construed *against* arbitration. Pet. App. 17a-18a.

3. Lastly, respondent addresses the issue of appellate jurisdiction and arbitration enforceability on the merits. Opp. 17-21. Although a full response here is neither possible nor warranted, several points deserve clarification.

First, respondent claims that the proper standard under Section 16(a)(3) should be whether the district court's order "leaves nothing for the court to resolve." Opp. 17. Under that standard, however, the district court unilater-

[5] Respondent does not address any of these rulings by the *Rosenberg* and *Koveleskie* courts. Instead, she emphasizes the irrelevant fact that the arbitration agreement in *Rosenberg* was not enforced because the party seeking enforcement failed to provide Rosenberg with materials as required by the agreement. 170 F.3d at 20.

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ally would control the court of appeals' jurisdiction through the label it applies to its order compelling arbitration. If it chooses to enter a stay, there can be no immediate appeal; if it chooses to dismiss, then the court of appeals would have jurisdiction. As the circuits adopting the majority approach have explained, Congress did not and could not have intended to establish a system that elevates form over substance in such an irrational manner.

Second, respondent largely ignores the Eleventh Circuit's rationale and argues that the decision as to the enforceability of the arbitration agreement should be "sustained on [an] alternative ground." Opp. 19. Specifically, she contends that a class forum is necessary because "the limited financial recoveries likely to be obtained by each individual, make it extremely unlikely that many, if any, individuals would vindicate their rights through arbitration." *Id.* at 21. To support that claim, respondent contends that, in her *first* complaint, "[t]he relief to which Ms. Randolph [would be] entitled individually is estimated to be about $15.00." *Id.* at 2 (citing *first* Complaint dated Jan. 3, 1996). Respondent, however, neglects to disclose that the decisions below were made in reference to respondent's *third* complaint, which sought (1) statutory and actual damages under the Truth in Lending Act, (2) actual and punitive damages of up to $10,000 under the Equal Credit Opportunity Act, and (3) attorneys' fees, litigation expenses and costs of suit. See Second Amended Complaint at 5-6, *Randolph* v. *Green Tree Financial Corp.—Alabama*, No. CV-96-D-11-N (M.D. Ala. filed Dec. 10, 1996). In any event, the district court properly rejected this argument. Pet. App. 32a-34a.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

March 8, 2000

* Counsel of Record

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No. 99-1235

IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.–ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND NATIONAL HOME EQUITY MORTGAGE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ALAN S. KAPLINSKY
MARTIN C. BRYCE, JR.
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

CHRISTOPHER R. LIPSETT *
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M. Street, N.W.
Washington, D.C. 20037
(202) 663-6000

*Counsel for Amici Curiae*

* Counsel of Record

February 28, 2000

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No. 99-1235

IN THE

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AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND NATIONAL HOME EQUITY MORTGAGE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This *amici curiae* brief is submitted in support of the Petitioners, Green Tree Financial Corp.– Alabama and Green Tree Financial Corporation. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, or their counsel.

## INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the 50 states and the District of Columbia and includes banks of all types and sizes – money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance and concern to banks or consumers of banking services. ABA members regularly include arbitration agreements in their consumer loan documents and deposit contracts.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently owned consumer finance offices to the nation's largest financial services, retail and automobile companies. The AFSA's membership includes national and state banks that operate multi-state consumer credit programs. AFSA's members regularly include arbitration agreements in their consumer loan documents.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity and education finance, bank sales of investment products, small business services and community development. CBA members regularly include arbitration agreements in their consumer loan documents and deposit contracts.

The National Home Equity Mortgage Association ("NHEMA") is a national trade organization whose members include lenders and others involved in home equity mortgage lending. NHEMA members frequently include arbitration agreements in contracts and rely upon their enforceability.

## SUMMARY OF ARGUMENT

Members of the *amici* organizations rely upon arbitration to resolve disputes with their customers in a fair, inexpensive and efficient manner. In entering into arbitration agreements, banks and other financial institutions rely on the enforceability of those agreements in the federal courts, in keeping with the strong federal policy in favor of arbitration embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Under the FAA, a party to an arbitration agreement should not be routinely required to engage in extensive, multi-level court proceedings to vindicate its federal right to arbitrate a dispute.

The Eleventh Circuit has made the court process longer and harder in two ways, clashing with other circuits on both points. First, the Eleventh Circuit ruled, contrary to at least five other circuits, that it has jurisdiction over an appeal from an order compelling arbitration even when there are other legal issues that remain to be resolved by the arbitration. Under this view, appeal is immediate and arbitration is delayed. Second, the Eleventh Circuit ruled that an arbitration agreement is unenforceable if it fails to make clear what arbitration will cost. This ruling conclusively resolved doubts about the costs of arbitration *against* the party seeking enforcement. The court's reasoning conflicts with this Court's approach to arbitration issues generally, and with decisions of other courts of appeals on the specific issue of arbitration costs.

Together, the Eleventh Circuit's rulings on its appellate jurisdiction and on the burden of proving arbitration costs will

mean lengthier and more costly court processes, forum shopping to avoid arbitration, less likelihood that disputes will be arbitrated, and uncertainty about rights under existing and future agreements that will discourage reliance on arbitration. This Court should grant certiorari to re-establish certainty regarding the enforcement of the arbitration clauses in tens of millions of consumer contracts.

## ARGUMENT

### I. THE COURT OF APPEALS DECISION THAT IT HAS APPELLATE JURISDICTION WHENEVER A CASE IS DISMISSED IN FAVOR OF ARBITRATION PRESENTS A SIGNIFICANT QUESTION ON WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

The Eleventh Circuit's decision deepens an existing split among the courts of appeals regarding their jurisdiction to hear appeals of orders compelling arbitration. As the Eleventh Circuit acknowledged, at least five circuits interpret section 16(a)(3) of the FAA to deny them jurisdiction to review orders compelling arbitration that are "embedded" in a controversy that includes other legal issues. (Pet. App. 7a-8a.) Here, the arbitration issue is embedded in a federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, lawsuit. Accordingly, at least five circuits would have declined to review the district court's order compelling arbitration until the arbitration process had resolved the Truth-in-Lending Act claim. In opting to exercise its jurisdiction prior to the arbitration, the Eleventh Circuit joined the two circuits that treat all orders dismissing cases in favor of arbitration as "final decisions" appealable under section 16(a)(3) of the FAA. (Pet. App. 9a, 11a-12a.)

This split among the circuit courts has powerful adverse consequences for the usefulness of arbitration agreements. One of the fundamental purposes of the FAA is to help arbitration fulfill its potential to streamline dispute resolution. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing legislative history); *see also Ex parte McNaughton*, 728 So. 2d 592, 597 (Ala. 1998) ("[A] party, by agreeing to arbitrate . . . trades the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.") (internal quotations and citation omitted), *cert. denied*, 120 S. Ct. 59 (1999). The benefits of arbitration are lost if arbitration itself can be obtained only after prolonged litigation. *See Allied-Bruce*, 513 U.S. at 282 (O'Connor, J., concurring). In contrast, allowing the arbitration to go forward "promotes both the pro-arbitration purposes of the FAA and the institutional goal of avoiding piecemeal appeals and systemic delays." *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 629 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *see also Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (review of embedded orders undermines the purposes of the FAA).

Absent review by this Court, the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), will continue to be eroded by those circuits that apply the minority rule allowing immediate appeals. Moreover, the availability of two different rules regarding appellate jurisdiction will sow confusion and encourage forum-shopping, as plaintiffs seeking to avoid arbitration, like the respondent in this case, file suit whenever possible in a district court located in a circuit where an arbitration order will be immediately appealable. Finally, the availability of an immediate appeal dramatically affects the cost-benefit analysis that the members of *amici*, and other banks and businesses, must consider before offering

arbitration to their customers. The minority rule on the timing of appeals thus discourages the use of arbitration. This Court should grant certiorari in order to create a uniform rule on this important issue.

## II. THE COURT OF APPEALS DECISION THAT AN ARBITRATION AGREEMENT IS UNENFORCEABLE WHENEVER THE RECORD DOES NOT ESTABLISH THE COSTS OF THE ARBITRATION ALSO PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ON WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. "[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce*, 513 U.S. at 270 (citation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).[2] In keeping with the FAA, this Court has emphatically rejected "the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989) (citation omitted). "[S]uspicion of arbitration . . . has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 481; *see also Gilmer*, 500 U.S. at 30. Instead, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should

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[2] Congress has continued to encourage the use of arbitration. *See, e.g.*, Y2K Act, Pub. L. No. 106-37 § 2(a)(8), (b)(3), 113 Stat. 185, 186-87 (1999) (encouraging arbitration of Y2K disputes). In doing so, Congress cited the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes," adding that "small businesses and individuals . . . already find [the legal] system inaccessible because of its complexity and expense." *Id.* § 2(a)(3)(B)(iii), (iv).

be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (citations omitted).

This general rule of resolving doubts in favor of arbitration has been applied by this Court in the face of allegations that arbitrators might be biased, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("[w]e decline to indulge the presumption" that a forum will not find competent and unbiased arbitrators), or might fail to follow the law, *see Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987). Other cases, in the lower courts, have involved the question whether arbitration fees and other costs might be so high as to warrant denying an order to arbitrate. In those cases, other circuits, following *Moses H. Cone*, *Mitsubishi* and *McMahon*, have resolved doubts about arbitration fees in favor of arbitration. *See Dobbins v. Hawk's Enters.*, 198 F.3d 715 (8th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

The Eleventh Circuit, by contrast, conclusively resolved what was at most a doubt about the reasonableness of arbitration costs *against* arbitration. The court began by asserting that "[t]he arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses." (Pet. App. at 17a.) But the clause itself raises no such concerns: the relevant provision is silent on each of these issues. The Eleventh Circuit simply imagined the possibility that respondent *might* face "steep filing fees, steep arbitrators' fees, or other high costs" (Pet. App. at 18a) and declared the arbitration agreement therefore unenforceable. Its action was squarely in conflict with the principle that any doubts

about the contract language should be resolved in favor of arbitration. *See Moses H. Cone*, 460 U.S. at 24-25.

The Eleventh Circuit's decision conflicts more broadly with this Court's arbitration jurisprudence. It is a throwback to the suspicion of arbitration found in cases such as *Wilko v. Swan*, 346 U.S. 427, 432, 435 (1953) (agreeing with Petitioners contention that "arbitration lacks the certainty of a suit at law . . . to enforce . . . rights" under the Securities Act of 1933), *overruled by Rodriguez de Quijas*, 490 U.S. at 484 (holding *Wilko* to be "seriously erroneous"). It also effectively places the burden on the party seeking to enforce its arbitration agreement to prove that arbitration costs will not be high. But *Moses H. Cone*, *Mitsubishi* and *McMahon* make it clear that the party seeking arbitration should not have to prove that the arbitration process is without flaw.

The Eleventh Circuit's decision conflicts directly with decisions of other circuits that have ruled on similar challenges to arbitration fees. The conflict is illustrated by the recent Eighth Circuit case of *Dobbins*. *See* 198 F.3d 715. In *Dobbins*, plaintiffs filed suit seeking damages for alleged violations of the federal Truth-in-Lending Act. The district court initially granted defendants' motion to compel arbitration and stayed the litigation. The plaintiffs subsequently moved to lift the stay on the ground that the fees to be imposed by the American Arbitration Association ("AAA") would prevent them from effectively asserting their claims. The district court lifted the stay, concluding that the $23,000 "final fee determination" precluded them from "availing themselves of the arbitral forum." *Id.* at 716-17. The Eighth Circuit reversed, citing the strong federal policy in favor of arbitration, and resolved doubts about

arbitration costs (there, on the issue of whether a fee reduction could be arranged) in favor of arbitration. *Id.*[3]

The Eleventh Circuit's decision is also in conflict with *Rosenberg*, in which the First Circuit rejected an argument that the New York Stock Exchange's arbitration procedures were unenforceable because plaintiffs might be assessed high fees or costs by the arbitration panel. *See* 170 F.3d 1. Unlike the Eleventh Circuit, the First Circuit had a record that demonstrated that steep fees were a real possibility: plaintiffs could be charged fees "which may be as high as $3,000 per day and tens of thousands of dollars per case." *Id.* at 15. Rather than using this data to defeat arbitration, the First Circuit explained that the appropriate remedy for excessive fees is provided by judicial review of a completed arbitration process — not by nullification of the arbitration agreement itself:

> [I]f unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the [statute at issue] could be presented by the employee to the reviewing court. That issue is not presented by this case.

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[3] In contrast to the Eleventh Circuit's decision, *Dobbins* is also consistent with section 10 of the FAA, which requires that plaintiffs avail themselves of the arbitral forum before complaining about it. *See* 9 U.S.C. § 10; *see also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) ("The language of the Act is unambiguous: it is only after an award has been made by the arbitrators that a party can seek to attack any of the arbitrators' determinations in court . . . ."); *Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) ("By its own terms, § 10 authorizes court action only after a final award is made by the arbitrator.") (citation omitted). By limiting challenges until after the arbitration has occurred, the FAA provides the parties with an opportunity to replace their concerns with actual experience of the arbitrator and forum. This approach reduces judicial involvement because the arbitrator's decision on fees (or on the merits) may eliminate the need for any judicial involvement. *See Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 330 (D. Md. 1999).

> As *Gilmer* said, "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."

*Id.* at 16 (quoting *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232)) (internal citation omitted); *accord Koveleskie v. SBC Capital Mkts.*, 167 F.3d 361, 366 (7th Cir.) (rejecting argument that arbitration clause was invalid because of potentially high arbitration fees), *cert. denied*; 120 S. Ct. 44 (1999).

In *Cole*, as in the case below, the arbitration clause was silent on the issue of arbitration fees. *See* 105 F.3d at 1469. However, the D.C. Circuit enforced the arbitration clause by simply "interpret[ing] the agreement as requiring [defendant] to pay all of the arbitrator's fees necessary for a full and fair resolution of [plaintiff's] statutory claims." *Id.* at 1485. Contrary to the holding of the Eleventh Circuit here, the D.C. Circuit interpreted the clause in such a manner because "[i]t is well understood that, where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful." *Id.* at 1485-86 (citations omitted).[4]

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[4] *Howard v. Anderson*, 36 F. Supp. 2d 183 (S.D.N.Y. 1999) is also instructive. In *Howard*, the plaintiff challenged an arbitration clause on the ground that she would be required "to pay a host of fees and an additional $2500 filing fee at the conclusion of her case." 36 F. Supp. 2d at 187. The court rejected plaintiff's arguments on the ground that she had "failed to present evidence that those fees have been demanded of her at this time. Ultimately, [plaintiff] may not be responsible for any fees." *Id.* The court also refused to assume that the arbitrator would require the plaintiff to pay an unreasonable fee: "*The Court is confident that once the relevant law is brought to the arbitrator's attention, he will conduct a proceeding that will vindicate Howard's statutory rights.*" *Id.* (emphasis added and citation omitted).

The decision of the Eleventh Circuit is wholly at odds with these and other decisions of other court of appeals. If the decision below is permitted to stand, it will create substantial confusion in the law governing the enforcement of arbitration agreements where the fees are unknown, or known to be potentially substantial. The Eleventh Circuit decision also conflicts more broadly with circuit court decisions that place the burden of proof about arbitration procedures on the party seeking to invalidate the arbitration agreement. *See, e.g.*, *Koveleskie*, 167 F.3d at 366 (placing burden of proof on party seeking to avoid arbitration); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (same), and with an array of decisions enforcing arbitration provisions in accordance with their terms. *See, e.g.*, *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (arbitration clause in consumer loan transaction); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (arbitration clause in standard form contract to purchase computer). Indeed, numerous courts around the country have enforced the very arbitration clause at issue in this case,[5] including, after the

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[5] *See, e.g.*, *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (compelling arbitration of RICO and state law claims); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp. 2d 804 (N.D. Ill. 1999) (compelling arbitration of Truth-in-Lending Act and state law claims); *In re Pate*, 198 B.R. 841 (Bankr. S.D. Ga. 1996) (plaintiff ordered to arbitrate fraud and other claims against Green Tree); *Green Tree Fin. Corp. v. Wampler*, No. 1970983, 1999 WL 667292 (Ala. Aug. 27, 1999) (compelling arbitration of fraud and unfair trade practices claims); *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) (enforcing Green Tree arbitration clause and requiring challenge to validity of arbitration clause to be arbitrated); *Ishmael v. Dutch Housing, Inc.*, No. 96-AP-100084, 1997 Ohio App. LEXIS 3974 (Aug. 13, 1997) (enforcing Green Tree arbitration clause and ordering arbitration of breach of warranty and unfair trade practices claims), *appeal dismissed*, 687 N.E.2d 472 (Ohio 1997); *Ex parte Parker*, 730 So. 2d 168 (Ala. 1999) (plaintiff ordered to arbitrate breach of contract and fraud claims under Green Tree arbitration

Eleventh Circuit's decision, the Supreme Court of Alabama. *See Green Tree Fin. Corp. v. Wampler*, No. 1970983, 1999 WL 667292, at *6 (Ala. Aug. 27, 1999) ("Where a . . . contract is silent on a particular question," a court cannot "indulg[e] an assumption that the proof would support a 'worst case' scenario.").

This conflict will encourage litigation in the Eleventh Circuit, where class action plaintiffs seeking to avoid arbitration agreements will not face as strong a presumption in favor of arbitration as they face in other circuits. The potential for such forum-shopping is a source of considerable concern to the members of the *amici* organizations who have arbitration agreements that apply to customers nationwide. Furthermore, the resulting pre-arbitration litigation will "frustrate the very purposes of the [FAA]," *Allied-Bruce*, 513 U.S. at 282 (O'Connor, J., concurring), which was designed to "avoid[ ] the delay and expense of litigation." *Allied-Bruce*, 513 U.S. at 280 (internal quotations omitted) (citing S. Rep. No. 68-536, at 3 (1924) and H.R. Rep. No. 97-542, at 13 (1982)). If a party seeking to block arbitration can embroil a party seeking to enforce an arbitration clause in detailed pre-arbitration court hearings, "most of the advantages inherent in arbitration are dissipated." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980); *see also Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 330 (D. Md. 1999); *Marc Rich & Co.*

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clause); *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998) (plaintiffs ordered to arbitrate fraud and conspiracy claims); *Pierman v. Green Tree Fin. Servicing Corp.*, 933 P.2d 955 (Okla. Ct. App. 1997) (plaintiff ordered to arbitrate fraud, civil conspiracy and other claims against Green Tree entity); *Ex parte Isbell*, 708 So. 2d 571 (Ala. 1997) (plaintiff ordered to arbitrate fraud, breach of contract, and other claims); *Ex parte Gates*, 675 So. 2d 371 (Ala. 1996) (plaintiff ordered to arbitrate fraud and other claims against assignee Green Tree).

*v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 387 (S.D.N.Y. 1978). In addition, the decision below creates serious problems for the arbitration clause drafter, who must anticipate every omission from the agreement that the Eleventh Circuit might later deem to serve as a basis for nullifying the agreement.

As if to prove that the mischief created by the Eleventh Circuit's decision extends beyond the issue of arbitration fees, a district court in that circuit recently relied upon it to invalidate an arbitration agreement on the grounds that defendants had "failed to demonstrate in this record that the National Arbitration Forum is a neutral, inexpensive and efficient forum to determine these claims as required by law." *See Baron v. Best Buy Co.*, 75 F. Supp. 2d 1368, 1370 (S.D. Fla. 1999) (citing *Randolph v. Green Tree Fin. Corp.–Alabama*, 178 F.3d 1149 (11th Cir. 1999)), *appeal docketed*, No. 99-14028 (11th Cir. Oct. 6, 1999). The *Baron* decision vividly demonstrates that the logic of *Randolph*, which places the burden of proof regarding costs on the party seeking arbitration, can and will be applied to other issues, such as arbitrator neutrality. Only review by this Court can correct this untoward development in the enforceability of arbitration claims.

Finally, it bears noting that the uncertainty created by the Eleventh Circuit's decision, which discourages banks and businesses from entering into arbitration agreements with consumers, ultimately harms consumers. "Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind." *Allied-Bruce*, 513 U.S. at 280 (citation omitted). For most consumers, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more

flexible in regard to scheduling . . . ." *Id.* (quoting H.R. Rep. No. 97-542, at 13 (1982)). As this Court emphasized in *Allied-Bruce*: "Indeed, arbitration's advantages often would seem helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation." *Id.* (citation omitted).

There is ample data that supports Congress' and the Court's belief in the advantages of arbitration for individuals.[6] For example, a study that compared employment claims filed with the AAA and in federal district courts found that, on average, arbitration resolved cases in half the time of litigation, and that individuals were four times more likely to prevail in arbitration. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). The Commentary to the National Arbitration Forum ("NAF") Bill of Rights similarly indicates that an individual plaintiff is more likely to win his or her case before the NAF than is a corporate plaintiff. *See* Arbitration Bill of Rights, National Arbitration Forum Commentary (1999) (available at http://www.arb-forum.com). By burdening banks and businesses that have offered and that would like to continue to offer arbitration, the Eleventh Circuit's decision makes it less likely that consumers will be offered the benefits of arbitration agreements in the future.

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[6] *See* Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Traps for the Weak and Unwary?*, 21 J. Corp. L. 331, 358 n.239 (1996) (citing Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, *in* Consumer Dispute Resolution: Exploring the Alternatives 313, 332 (American Bar Ass'n Special Committee on Dispute Resolution 1983)); *id.* at 33 n.10 (citing C. Edward Fletcher, *Arbitrating Securities Disputes* 176 (1990)).

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHRISTOPHER R. LIPSETT *
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ALAN S. KAPLINSKY
MARTIN C. BRYCE, JR.
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

*Counsel for Amici Curiae*

* Counsel of Record

February 28, 2000

(19)

No. 99-1235

Supreme Court, U.S.
FILED
JUN - 8 2000
CLERK

IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## JOINT APPENDIX


CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY,
JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

*Counsel for Petitioners*

JOSEPH M. SELLERS *
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD
& TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 S. Court Street
P.O. BOX 4276
Montgomery, Alabama 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 N. Prairie Street
P.O. Box 350
Union Springs, Alabama 36089
(334) 738-4225

*Counsel for Respondent*

* Counsel of Record


June 8, 2000


**PETITION FOR CERTIORARI FILED JANUARY 21, 2000**
**CERTIORARI GRANTED APRIL 3, 2000**


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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
(Montgomery)

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Civil Docket No. 96-CV-11

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LARKETTA RANDOLPH, on behalf of herself and all others similarly situated,

*Plaintiff,*

v.

GREEN TREE FINANCIAL CORP.—ALABAMA,

*Defendant.*

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**DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 1/3/96 | 1 | COMPLAINT containing request for class certification (Exhibits A-C attached), Filing Fee $ 120 Receipt # 58402 (cac) [Entry date 01/05/96] |
| 1/3/96 | 1 | DEMAND for jury trial by Larketta Randolph (cac) [Entry date 01/05/96] |
| 1/5/96 | 2 | SUMMONS issued for Green Tree—Alabama; summons and complaint mailed by cmrrr to named defendant. (cac) [Entry date 01/05/96] |
| 1/5/96 | -- | File referred to Judge De Ment. (cac) [Entry date 01/05/96] |
| 1/9/96 | 3 | RETURN RECEIPT CARD showing service of summons and complaint on (signature illegible) on 1/8/96 for Green Tree - |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Alabama . Answer due on 1/28/96 for Green Tree - Alabama (cac) [Entry date 01/10/96] |
| 1/24/96 | 4 | MOTION by Green Tree—Alabama to Extend Time in which to move, answer or otherwise respond to complaint referred to Judge Ira De Ment (cac) [Entry date 01/25/96] |
| 1/29/96 | — | Stamped ORDER granting [4-1] motion to Extend Time in which to move, answer or otherwise respond to complaint, reset Aswer deadline to 2/12/96 for Green Tree—Alabama (by Judge Ira De Ment), copies mailed to counsel; furnished to RL. (jrr) [Entry date 01/29/96] |
| 2/12/96 | 5 | MOTION by Green Tree—Alabama to Compel arbitration, and to Stay proceedings pending resolution of arbitration, or, in the alternative, to Dismiss (Exhibit 1 attached), referred to Judge Ira De Ment (cac) [Entry date 02/13/96] |
| 2/12/96 | 6 | BRIEF by Green Tree - Alabama in support of [5-1] motion to Compel arbitration, [5-2] motion to Stay proceedings pending resolution of arbitration, [5-3] motion to Dismiss referred to Judge Ira De Ment (cac) [Entry date 02/13/96] |
| 2/14/96 | 7 | ORDER TO SHOW CAUSE as to why defendant's motion to compel arbitration, etc., should not be granted: Response to Order to Show Cause due on 2/28/96 for Larketta Randolph ( signed by Judge Ira De |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Ment ) , copies mailed to counsel; furnished to RL. (cac) [Entry date 02/14/96] |
| 2/26/96 | 8 | MOTION by Larketta Randolph to Extend Time in which to respond to defendant's motion to compel arbitration referred to Judge Ira De Ment (cac) [Entry date 02/27/96] |
| 2/28/96 | — | Stamped ORDER granting [8-1] motion to Extend Time in which to respond to defendant's motion to compel arbitration, Response to Motion reset to 3/13/96 for [5-1] motion to Compel arbitration ( by Judge Ira De Ment ) , copies mailed to counsel; furnished to RL. (war) [Entry date 02/28/96] |
| 3/12/96 | 9 | MOTION by Larketta Randolph to Extend Time To Respond to Defendant's Motion to Compel Arbitration; referred to Judge Ira De Ment (dmk) [Entry date 03/12/96] [Edit date 03/14/96] |
| 3/18/96 | — | Stamped ORDER granting [9-1] motion to Extend Time To Respond to Defendant's Motion to Compel Arbitration ( by Judge Ira De Ment ) , copies mailed to counsel. (dmk) [Entry date 03/18/96] |
| 3/18/96 | 10 | RESPONSE by Larketta Randolph and opposition to [5-1] motion to Compel arbitration by Green Tree—Alabama (Exhibit A attached); referred to Judge Ira De Ment (dmk) [Entry date 03/19/96] |
| 3/18/96 | 11 | MOTION by Larketta Randolph to Stay Arbitration, and Allow Limited Discovery; re- |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | ferred to Judge Ira De Ment (dmk) [Entry date 03/19/96] |
| 3/18/96 | 12 | MOTION by Larketta Randolph For Leave to Amend [1-1] complaint; referred to Judge Ira De Ment (dmk) [Entry date 03/19/96] |
| 3/20/96 | 13 | ORDER TO SHOW CAUSE why plaintiff's motion to stay arbitration and allow limited discovery should not be granted: Response to Order to Show Cause due on 4/3/96 for Green Tree—Alabama (signed by Judge Ira De Ment ), copies mailed to counsel; furnished to RL. (dmk) [Entry date 03/20/96] |
| 3/22/96 | 14 | MOTION by Green Tree—Alabama to Extend Time To Respond To Order To Show Cause; referred to Judge Ira De Ment (dmk) [Entry date 03/25/96] |
| 3/26/96 | — | Stamped ORDER granting [14-1] motion to Extend Time To Respond To Order To Show Cause, reset response to Order to Show Cause due on 4/10/96 for Green Tree —Alabama (by Judge Ira De Ment ), copies mailed to counsel; furnished to RL. (dmk) [Entry date 03/26/96] |
| 4/10/96 | 15 | Response by Green Tree—Alabama to [13-1] Order to Show Cause re: arbitration issues, referred to Judge Ira De Ment (cac) [Entry date 04/11/96] |
| 5/8/96 | 16 | MOTION by Larketta Randolph for Leave to File reply to defendant's response to show cause order with respect to abtitration issues (reply attached), referred to Judge Ira De Ment (cac) [Entry date 05/08/96] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 5/10/96 | — | Stamped ORDER granting [16-1] motion for Leave to File reply to defendant's response to show cause order with respect to arbitration issues (by Judge Ira De Ment ), copies mailed to counsel; furnished to RL. (cac) [Entry date 05/10/96] |
| 5/10/96 | 17 | REPLY by Larketta Randolph to defendant's response to show cause order with respect to arbitration issues, referred to Judge Ira De Ment (cac) [Entry date 05/10/96] |
| 6/4/96 | 18 | MOTION by Green Tree—Alabama for Leave to File supplemental reply brief re: motion to compel arbitration (supplemental brief attached), referred to Judge Ira De Ment (cac) [Entry date 06/04/96] |
| 6/6/96 | — | Stamped ORDER granting [18-1] motion for Leave to File supplemental reply brief re: motion to compel arbitration ( by Judge Ira De Ment), copies mailed to counsel. (cac) [Entry date 06/06/96] |
| 6/6/96 | 19 | Supplemental BRIEF by Green Tree—Alabama in support of [5-1] motion to Compel arbitration referred to Judge Ira De Ment (cac) [Entry date 06/06/96] |
| 6/11/96 | 20 | MOTION by Green Tree—Alabama for Protective Order with respect to notice of deposition (Exhibits 1-2 attached), referred to Mag. Judge John L. Carroll (cac) [Entry date 06/12/96] |
| 6/24/96 | 21 | ORDER, Plaintiff's Response to Motion set to 6/28/96 for [20-1] motion for Protective Order with respect to notice of deposition; |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | directing the clerk's office to provide counsel for the parties with a copy of this order by facsimile, ( signed by Mag. Judge John L. Carroll ), copies mailed to counsel; faxed as directed. (cac) [Entry date 06/24/96] |
| 6/27/96 | 22 | MOTION by Larketta Randolph to Extend Time in which to respond to defendant's motion for protective order referred to Judge Ira De Ment (cac) [Entry date 06/28/96] |
| 7/2/96 | — | Stamped ORDER granting [22-1] motion to Extend Time in which to respond to defendant's motion for protective order, Response to Motion reset to 7/12/96 for [20-1] motion for Protective Order with respect to notice of deposition ( by Mag. Judge John L. Carroll ) , copies mailed to counsel. (cac) [Entry date 07/02/96] |
| 7/8/96 | 23 | MOTION by Larketta Randolph for Leave to File second amended complaint (Second amended complaint attached); referred to Judge Ira De Merit (ydl) [Entry date 07/09/96] |
| 7/8/96 | 24 | RESPONSE by Larketta Randolph in opposition to [20-1] motion for Protective Order with respect to notice of deposition by Green Tree—Alabama; referred to Mag. Judge John L. Carroll (ydl) [Entry date 07/09/96] |
| 8/5/96 | — | Stamped ORDER denying [20-1] motion for Protective Order with respect to notice of deposition (signed by Judge Ira De Ment ), |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | copies mailed to counsel, furnished to RL. (vmc) [Entry date 08/05/96] |
| 8/9/96 | 25 | ORDER TO SHOW CAUSE as to why plaintiff's motion for leave to file second amended complaint should not be granted: Response to Order to Show Cause due on 8/23/96 for Green Tree—Alabama (signed by Judge Ira De Ment ), copies mailed to counsel, furnished to RL. (vmc) [Entry date 08/09/96] [Edit date 08/21/96] |
| 8/13/96 | 26 | SCHEDULING ORDER setting Pretrial Conference for 9/3/97 before Judge Ira De Ment; Motion Filing deadline on 6/5/97; Discovery cutoff 8/20/97; jury trial set for 10/6/97 before Judge Ira De Ment; set amended pleading deadline for 10/27/96; Mediation Notice deadline on 11/22/96 (signed by Judge Ira De Ment), copies mailed to counsel; furnished to MT and RL. (cac) [Entry date 08/13/96] |
| 12/10/96 | — | Stamped ORDER granting [23-1] motion for Leave to File second amended complaint (by Judge Ira De Ment ), copies mailed to counsel; furnished to RL. (vmc) [Entry date 12/10/96] |
| 12/10/96 | 27 | AMENDED COMPLAINT by Larketta Randolph amending [1-1] complaint; jury demand (vmc) [Entry date 12/10/96] |
| 12/10/96 | 27 | DEMAND for jury trial by Larketta Randolph (vmc) [Entry date 12/10/96] |
| 12/19/96 | 28 | MOTION by Green Tree—Alabama to Compel arbitration, and to Stay pro- |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | ceedings, or, in the alternative, to Dismiss second amended complaint referred to Judge Ira De Ment (cac) [Entry date 12/20/96] |
| 1/13/97 | 29 | Notic [sic] of filing additional authority by Larketta Randolph in opposition to [28-1] motion to Compel arbitration (w/attachments), referred to Judge Ira De Ment (cac) [Entry date 01/14/97] |
| 3/6/97 | 30 | SUPPLEMENTAL BRIEF by Green Tree—Alabama in support of [28-1] motion to Compel arbitration referred to Judge Ira De Ment (ajw) [Entry date 03/10/97] |
| 3/6/97 | 31 | SUPPLEMENTAL SUBMISSION by Green Tree—Alabama in support of [28-1] motion to Compel arbitration by Green Tree—Alabama (Exhibit A attached); referred to Judge Ira De Ment (ajw) [Entry date 03/10/97] |
| 3/18/97 | 32 | Notice of Filing Additional Authority by Larketta Randolph in support of [28-1] motion to Compel arbitration referred to Judge Ira De Ment (ajw) [Entry date 06/11/97] |
| 4/2/97 | 33 | Second Supplemental BRIEF by Green Tree—Alabama in support of [30-1] brief in support (w/attachments); referred to Judge Ira De Ment (ajw) [Entry date 04/03/97] |
| 4/24/97 | 34 | Notice of Filing Additional Authorities by Larketta Randolph in support of [29-1] brief in opposition (Exhibits A & B attached); referred to Judge Ira De Ment (ajw) [Entry date 04/25/97] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 6/10/97 | 35 | Notice of Filing Additional Authority by Larketta Randolph in support of [28-1] motion to Compel arbitration (Exhibit A attached); referred to Judge Ira De Ment (ajw) [Entry date 06/11/97] |
| 6/26/97 | 36 | Notice Concerning Settlement Conference and Mediation filed by Green Tree—Alabama; referred to Judge Ira De Ment (nna) [Entry date 06/26/97] [Edit date 06/26/97] |
| 8/4/97 | 37 | ORDER setting Rule 16 Scheduling Order Deadlines: Pretrial Conference for 2:00 P.M., 9/3/97, in chambers, Montgomery, AL, before Judge Ira De Ment; Proposed Pretrial Order due 8/29/97; Jury Trial set for 10/6/97, Montgomery, AL, before Judge Ira De Ment; (signed by Judge Ira De Ment); copies mailed to counsel; furnished to MT, RL, RG. (nna) [Entry date 08/04/97] |
| 9/2/97 | 38 | ORDER that the trial presently set 10/6/97, and the pretrial hearing presently set 9/3/97, are hereby CONTINUED ; resetting Scheduling Order Deadlines: joining of parties, amended pleadings on 11/16/97; Discovery cutoff to 10/9/97; Motion Filing to 7/25/97; Pretrial Conference for 10/23/97, in Montgomery, AL, before Judge Ira De Ment; Jury Trial set for 12/2/97, in Montgomery, AL, before Judge Ira De Ment; Mediation Notice to 11/16/97; the deadlines in the Rule 16 Uniform Scheduling Order filed previously in this case are to be adjusted in accordance with the new pretrial and trial |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | dates (signed by Judge Ira De Ment); copies mailed to counsel; furnished to MT, RL, CAC. (nna) [Entry date 09/03/97] |
| 9/16/97 | 39 | ORDER setting Scheduling Order Deadlines: Pretrial hearing as provided by Rule 16, Federal Rules of Civil Procedure, on 10/23/97, at 10:00 A.M. in Chambers, Montgomery, AL, before Judge Ira De Ment; parties are DIRECTED to jointly prepare a proposed pretrial order in accordance with the attached outline; plaintiff is DIRECTED to mail the original of the proposed pretrial order to this Court to be received no later than five business days prior to the pretrial hearing; Proposed Pretrial Order due 10/28/97; Jury Trial commences 12/2/97, in Montgomery, AL ; and as further setout ( signed by Judge Ira De Ment ); copies mailed to counsel; furnished to MT, RL, CAC. (nna) [Entry date 09/16/97] |
| 9/29/97 | — | Stamped ORDER granting [12-1] motion For Leave to Amend [1-1] complaint ( by Judge Ira De Ment ); copies mailed to counsel. (nna) [Entry date 09/29/97] |
| 9/29/97 | 40 | AMENDED COMPLAINT by Larketta Randolph amending [1-1] complaint, jury demand (nna) [Entry date 09/29/97] |
| 9/30/97 | 41 | SUMMONS issued for Green Tree Financial Corporation, Green Tree Financial Servicing Corporation; summons, complaint, amended complaint, and second amended complaint mailed to named defendants by |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | cmrrr (nna) [Entry date 09/30/97] [Edit date 09/30/97] |
| 10/8/97 | 42 | RETURN RECEIPT CARD showing service of summons, complaint, amended complaint and second amended complaint on J. Nelson on 10/3/97 for Green Tree Servicing. Answer due on 10/23/97 for Green Tree Servicing (nna) [Entry date 10/08/97] [Edit date 10/08/97] |
| 10/8/97 | 43 | RETURN RECEIPT CARD showing service of summons, complaint, amended complaint and second amended complaint on J. Nelson on 10/3/97 for Green Tree Financial. Answer due on 10/23/97 for Green Tree Financial (nna) [Entry date 10/08/97] [Edit date 10/08/97] |
| 10/10/97 | 44 | MOTION by Green Tree—Alabama to Compel Arbitration and to Stay Proceedings or, in the alternative to Dismiss Amended Complaint; referred to Judge Ira De Ment (nna) [Entry date 10/14/97] |
| 10/14/97 | 45 | NOTICE OF FILING ADDITIONAL AUTHORITY (BRIEF w/Exhibits A-B attached) by Larketta Randolph in support of [29-1] brief in opposition; referred to Judge Ira De Ment (nna) [Entry date 10/15/97] |
| 10/16/97 | 46 | JOINT MOTION by Larketta Randolph, Green Tree—Alabama, Green Tree Financial for Extension to File Pretrial Order ; referred to Judge Ira De Ment (nna) [Entry date 10/17/97] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/17/97 | 47 | MOTION by Green Tree—Alabama for Leave to File supplemental reply brief; referred to Judge Ira De Ment (nna) [Entry date 10/20/97] |
| 10/21/97 | — | Stamped ORDER granting [46-1] joint motion for Extension to File Pretrial Order ( by Judge Ira De Ment ); copies mailed to counsel. (nna) [Entry date 10/22/97] |
| 10/21/97 | 48 | ORDER that the pretrial hearing presently set for 10/23/97 is hereby reset to 11/7/97, at 2:30 P.M., in Chambers, Montgomery, AL, before Judge Ira De Ment; it is further ORDERED, that defendant file one (1) pleading expressing defendant's contentions and arguments on or before 12:00 p.m., October 31, 1997; this pleading shall taken [sic] the place of all of defendant's previous pleadings filed to date; defendant may also contemporaneously submit an evidentiary appendix in support of its pleading ( signed by Judge Ira De Ment ); copies mailed to counsel; furnished to MT, RL. (nna) [Entry date 10/22/97] |
| 10/23/97 | 49 | Notice of Filing Additional Authority; referred to Judge De Ment (nna) [Entry date 10/24/97] |
| 10/31/97 | 50 | MOTION by Green Tree—Alabama, Green Tree Financial, Green Tree Servicing to Compel Arbitration, to Stay, or, in the alternative to Dismiss; referred to Judge Ira De Ment (nna) [Entry date 10/31/97] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/31/97 | 50 | BRIEF by Green Tree—Alabama, Green Tree Financial, Green Tree Servicing in support of [50-1] motion to Compel Arbitration, [50-2] motion to Stay, [50-3] motion to Dismiss; referred to Judge Ira De Ment (nna) [Entry date 10/31/97] |
| 10/31/97 | 51 | EVIDENTIARY SUBMISSION (BRIEF) by Green Tree—Alabama, Green Tree Financial, Green Tree Servicing in support of [50-1] motion to Compel Arbitration, [50-2] motion to Stay, [50-3] motion to Dismiss ; (Exhibit 1-3 attached) referred to Judge Ira De Ment (nna) [Entry date 10/31/97] |
| 11/26/97 | 52 | MEMORANDUM OPINION AND ORDER granting [50-1] motion to Compel Arbitration; denying [50-2] motion to Stay; granting [50-3] motion to Dismiss WITH PREJUDICE; defendant Green Tree Financial Servicing Corporation be and the same is hereby DISMISSED as a party Defendant to this action; plaintiff is herewith ENJOINED and RESTRAINED from failing forthwith to arbitrate her claims against the remaining Green Tree Defendants ( signed by Judge Ira De Ment); copies mailed to counsel; (nna) [Entry date 11/26/97] |
| 11/26/97 | — | Case closed (nna) [Entry date 06/25/98] |
| 12/10/97 | 53 | MOTION by Larketta Randolph for Reconsideration of [52-1] order (Exhibits A-B attached); referred to Judge Ira De Ment (nna) [Entry date 12/10/97] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 12/12/97 | 54 | ORDER TO SHOW CAUSE, if any there be, no later than 12/29/97, as to why said motion for reconsideration, filed by 12/10/97, should be granted: Response to Order to Show Cause due on 12/29/97 for Green Tree Financial, for Green Tree—Alabama (signed by Judge Ira De Ment); copies mailed to counsel (nna) [Entry date 12/12/97] |
| 12/17/97 | 55 | MOTION by Larketta Randolph to Toll Running of Time for Appeal; referred to Judge Ira De Ment (nna) [Entry date 12/18/97] |
| 12/19/97 | 56 | ORDER denying as moot [55-1] motion to Toll Running of Time for Appeal (signed by Judge Ira De Ment), copies mailed. VACATED PER ORDER DATED 12/23/97 (hhk) [Entry date 12/19/97] [Edit date 12/23/97] |
| 12/22/97 | 57 | MOTION by Larketta Randolph for Reconsideration of [56-1] order re: motion to toll-running [sic] of time for appeal; referred to Judge Ira De Ment (dmk) [Entry date 12/23/97] |
| 12/23/97 | 58 | ORDER granting [57-1] motion for Reconsideration of [56-1] order re: motion to toll-running [sic] of time for appeal; vacating [56-1] order re: motion to toll the running time; that time for plaintiff's filing appeal is hereby tolled until such time as court rules on plaintiff's 12/10/97 motion for reconsideration (signed by Judge Ira De Ment), |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | copies mailed to counsel. (dmk) [Entry date 12/23/97] |
| 12/30/97 | 59 | RESPONSE by Green Tree—Alabama, Green Tree Financial to [57-1] motion for Reconsideration of [56-1] order re: motion to toll running of time for appeal by Larketta Randolph; referred to Judge Ira De Ment (nna) [Entry date 12/30/97] |
| 1/5/98 | 60 | ORDER denying [53-1] motion for Reconsideration of [52-1] order ( signed by Judge Ira De Ment ); copies mailed to counsel (nna) [Entry date 01/05/98] |
| 1/21/98 | 61 | NOTICE OF APPEAL by Larketta Randolph to the U.S. Court of Appeals, Eleventh Circuit from the order entered on 1/5/98, denying Plaintiff's Motion for Reconsideration of Judge DeMent's [sic] Memorandum Opinion and Order entered on 11/26/97. (Copies mailed to C. Knox McLaney, III, Esq., with appeal information sheet & civil docketing statement; Angela L. Kimbrough, Esq., Lynn W. Jinks, III, Esq., Robert Huffaker, Esq., William Webster, Esq., & certified copy to USCA with copies of orders appealed from and docket entires [sic].) FILING FEE $ 105.00 RECEIPT # 69289 (hhk) [Entry date 01/22/98] |
| 1/22/98 | — | Notice of Appeal and certified copy of docket to USCA: [61-1] appeal by Larketta Randolph (hhk) [Entry date 01/22/98] |
| 1/30/98 | — | USCA Case Number Re: [61-1] appeal by Larketta Randolph USCA NUMBER: 98-6055 (hhk) [Entry date 02/06/98] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4/9/98 | — | Request for Certificate of Readiness from USCA, 11th Circuit, Re: [61-1] appeal by Larketta Randolph (hhk) [Entry date 04/10/98] |
| 4/10/98 | — | CERTIFICATE OF READINESS of record on appeal mailed to USCA, 11th Circuit and counsel: [61-1] appeal by Larketta Randolph (hhk) [Entry date 04/10/98] |
| 7/31/98 | — | REQUEST for Record On Appeal from USCA re: [61-1] appeal by Larketta Randolph (hhk) [Entry date 08/04/98] |
| 8/4/98 | — | Certified and transmitted Record on Appeal to U.S. Court of Appeals: [61-1] appeal by Larketta Randolph (hhk) [Entry date 08/04/98] |
| 8/10/98 | — | ACKNOWLEDGEMENT of RECEIPT of RECORD ON APPEAL from USCA Re: USCA Number: 98-6055 (kcg) [Entry date 08/11/98] |

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ATLANTA

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Docket # 98-6055-FF

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RANDOLPH

v.

GREEN TREE FINANCIAL

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**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 03/12/98 | Probable Jurisdiction Noted |
| 04/02/98 | Appearance Form Submitted: Angela L. Kimbrough |
| 04/20/98 | Certificate of Readiness |
| 05/04/98 | Briefing Notice Issued |
| 06/15/98 | Appellant Brief |
| 07/23/98 | Appellee Brief |
| 08/19/98 | Reply Brief |
| 03/25/99 | Argument Scheduled |
| 03/27/99 | See Previous Docket Sheet for Case Information prior to conversion date. |
| 06/22/99 | Opinion Issued |
| 06/22/99 | Judgment Entered |
| 06/22/99 | OPIN1 (Opinion-Issuance) issued. |
| 07/06/99 | Bill of Costs Filed: Costs awarded to Appellant: Appellant |

| DATE | PROCEEDINGS |
|---|---|
| 07/13/99 | Motion to File Amicus Brief (AMERICAN BANKERS ASSOCIATION, ET AL.) |
| 07/13/99 | Motion to File Amicus Brief (ALABAMA BANKERS ASSOCIATION, ET AL.) |
| 07/13/99 | Amicus Brief OF AMERICAN BANKERS ASSOC, ET AL. in support of rehearing |
| 07/13/99 | Amicus Brief OF ALABAMA BANKERS ASSOC, ET AL. in support of rehearing |
| 07/13/99<br>07/14/99 | Petition for Rehearing En Banc |
| 07/21/99 | The motions of Alabama Bankers Assoc and American Bankers Assoc for leave to file brief of amici curiae is [sic] GRANTED. EEC |
| 07/21/99 | MOT2 (Motion-Court Action) issued. |
| 08/13/99 | Supplemental Authority for Appellee; sent to OA panel on 8/19/99 |
| 09/02/99 | TESTHAB3 (Test HAB-3 Letter) issued. |
| 09/02/99 | MOT2 (Motion-Court Action) issued. |
| 09/13/99 | Motion to Allow Filing of Supplemental Authority (Appellees) |
| 09/15/99 | Motion to Allow Filing of Supplemental Authority (Appellant) |
| 09/29/99 | Appellees', Green Tree Financial Corp.-Alabama, and Green Tree Financial Corp., motion to allow filing of supplemental authority is granted. Appellant, Larketta Randolph's motion to allow filing of supplemental authority is granted. (EEC) J |

| DATE | PROCEEDINGS |
|---|---|
| 09/29/99 | Supplemental Authority for Appellant |
| 09/29/99 | Supplemental Authority for Appellee |
| 09/29/99 | MOT2 (Motion-Court Action) issued. |
| 10/28/99 | The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED. |
| 10/28/99 | REHG1(Rehearing-Transmittal) issued. |
| 11/03/99 | Motion to Stay Mandate filed by Appellee |
| 11/19/99 | Appellees' motion to stay issuance of mandate pending filing of cert is GRANTED. Mandate is stayed for 90 days . . . (EEC)(see file for complete text) |
| 11/19/99 | MOT2 (Motion-Court Action) issued. |
| 01/31/00 | Notice of Filing Certiorari, SC #99-1235 |
| 04/06/00 | Certiorari Granted - SC #99-1235 |

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

---

Case No. 96-D-11-N

LARKETTA RANDOLPH, on behalf of herself
and all others similarly situated,
*Plaintiff,*

vs.

GREEN TREE FINANCIAL CORP.—ALABAMA,
*Defendant.*

---

## AFFIDAVIT OF LARKETTA RANDOLPH

Before me, the undersigned authority, a notary public in and for the State and County aforesaid, personally came and appeared Larketta Randolph, who is known to me and who, after first being duly sworn, did depose and say as follows:

My name is Larketta Randolph and I am the Plaintiff in the above styled cause. I am over the age of 21 years and of sound mind. I am under no disability and am, in all respects, competent to testify in this matter. I am making this affidavit based upon my own personal knowledge of the facts as stated herein.

The transaction which forms the basis of this cause occurred on January 25, 1994, when I purchased a mobile home from Better Sense [sic] Homebuilders, Inc. In connection with the purchase of that mobile home, I executed some paperwork presented to me by a representative of Better Sense [sic]. I did not participate in any way in the preparation of this paperwork. At the time of my execution of this document I was not given an opportunity to read it. It was merely placed in front of me and I was instructed where to

sign. The Better Sense [sic] representative, Robert Banks, brought this paperwork to my home for me to sign. He told me that he was in a hurry, that he had to get the paperwork turned in that day to prevent the interest rate from going up. He did not give me an opportunity to read it before I signed it. Idid [sic] not even know that there was anything on the reverse of the paperwork. I was never shown the reverse side of the contract. It was not pointed out to me, and I was not informed, that there were provisions on the reverse side of the contract which might affect my rights. Specifically, I was not told nor was I given an opportunity to read any arbitration language on the reverse side of the contract. At the time of my execution of this contract I certainly did not understand that I was giving up my right to a trial by jury in the event that I was damaged by any wrongful conduct of the creditor.

SWORN TO SUBSCRIBED to me this 15th day of March, 1996.

/s/ Larketta Randolph
LARKETTA RANDOLPH

/s/ Sarah Kathryn Chandler
SARAH KATHRYN CHANDLER
NOTARY PUBLIC
COMMISSION EXPIRES: 1-18-98

[Filed Dec. 10, 1996]

IN THE UNITED DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

---

CASE NO. CV-96-D-11-N

LARKETTA RANDOLPH, on behalf of herself
and all others similarly situated,
*Plaintiff,*

vs.

GREEN TREE FINANCIAL CORP.,
GREEN TREE FINANCIAL SERVICING CORPORATION AND
GREEN TREE, FINANCIAL CORP—ALABAMA
*Defendant.*

---

SECOND AMENDED COMPLAINT
MATTERS COMMON TO MULTIPLE COUNTS

1. This action seeks redress for the practices of defendant Green Tree Financial Corp., Green Tree Financial Corp.—Alabama and Green Tree Financial Servicing Corporation (hereinafter referred to collectively as "Green Tree") for requiring "vendor single interest" insurance, said coverage protecting the vendor or lienholders against costs of repossession in the event of default. The requirement of such a provision without disclosure is a violation of the Federal Truth-In-Lending Act ("TILA").

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1640. The venue in this District is proper because the events complained of took place in this District.

## PARTIES

3. Plaintiff, Larketta Randolph, resides at Route 3, Box 26, Union Springs, Alabama, 36089-9803.

4. Defendant, Green Tree Financial Corp., is a Delaware corporation with a place of business located at 324 Interstate Park Drive, Montgomery, Alabama 36109, and with its principal place of business located at 1100 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota, 55102-1639.

5. The Defendant, Green Tree Financial Corp.—Alabama, is a Delaware corporation with a place of business located at 324 Interstate Park Drive, Montgomery, Alabama, 36109.

6. The Defendant, Green Tree Financial Servicing Corporation, is a Delaware corporation and a wholly-owned subsidiary of Green Tree Financial Corp. Green Tree Financial Servicing Corporation provides servicing functions for the manufactured home contracts of Green Tree Financial Corp.

## MS. RANDOLPH'S TRANSACTION

7. On or about January 25, 1994, Ms. Randolph purchased a 1994 Redman mobile home from Better Cents Home Builders, Inc. (hereinafter "Better Cents") in Opelika, Alabama. Better Cents obtained financing for Ms. Randolph from Green Tree in Montgomery, Alabama.

8. In connection with the financing for Ms. Randolph, Green Tree required insurance with a "vendor's single interest" rider which covered the cost of repossession in the event of default for Green Tree. *See Exhibit A*. No disclosure of this cost was made in the Truth in Lending disclosure. *See Exhibit B.*

9. On the anniversary date, Green Tree again required insurance against its potential cost of repossession and no Truth in Lending disclosure was made. *See Exhibit C.*

10. On information and belief, Green Tree fails to make Truth in Lending disclosures in any transaction in which it requires insurance which covers possible repossession expenses.

11. In its form contracts, Green Tree inserts and requires all consumers to sign a contract requiring a waiver of all causes of action against Green Tree, including statutory causes of action which would include any cause of action under any federal consumer protection act, under the guise of an arbitration agreement. See back page of Exhibit B.

12. The procurement of the arbitration contract is a fraudulent scheme effectuated by the superior bargaining power of defendant to prevent litigation, in that it is placed in an inconspicuous place on the contract, and is therefore void and unenforceable.

## CLASS ALLEGATIONS

13. Plaintiff brings this action on behalf of a class.

14. The Class is tentatively defined as all persons who satisfy each of the following criteria:

a. They entered into a contract for the financing of a mobile home which was either with Green Tree or immediately assigned by the dealer who arranged financing to Green Tree;

b. Green Tree required insurance which provided coverage against possible repossession costs;

c. Their transaction was financed by a retail installment contract;

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were provided);

e. The retail installment contract does not show the amount charged for the repossession coverage and each

subsequent renewal charge for insurance does not contain a truth in lending statement; and

f. The retail installment contract contained an arbitration clause which required a waiver of statutory rights under any federal consumer protection act as a condition to the extension of credit.

g. The statute of limitations is one year prior to the filing of this action as to Count I and two years prior to the filing of this action as to Count II.

15. Ms. Randolph is designated as the Class representative.

16. Plaintiff alleges that the Class is sufficiently numerous to make joinder impractical.

17. There are common questions of law and fact, which predominate over any individual questions. The common questions of fact are the failure to disclose the cost to the consumer of the possible repossession costs in the insurance policies required by Green Tree.

18. The common question of law is whether it is a violation of the Truth in Lending Act to fail to disclose charges for repossession expenses required by Green Tree in policies of insurance.

19. Plaintiff will fairly and adequately represent the interests of the Class. She feels that she has been the victim of unfair and deceptive trade practices by the defendant. She has retained counsel who have experience in prosecuting class actions and claims involving unfair and deceptive practices by financial institutions and their dealers, brokers and agents.

20. A class action is an appropriate means for the fair and efficient adjudication of this dispute. The unsophisticated consumers who are the victims of defendant's practices cannot afford to file individual suits. Most probably do not recognize that defendant's conduct is illegal.

COUNT I

21. Plaintiff incorporates paragraphs 1 through 20 by reference.

22. Green Tree is a creditor within the meaning of TILA.

23. The notes and security instruments signed by plaintiff and borrowers for the purchase of mobile homes were extensions of credit subject to TILA.

24. The requirement that insurance policies contain provisions covering Green Tree's possible repossession expenses are credit charges as defined by TILA and occur annually when each policy is renewed. No TILA disclosures are given by Green Tree.

WHEREFORE, the Court should enter judgment in favor of Plaintiff and the Class and against Defendant:

a. Awarding statutory damages;

b. Awarding actual damages;

c. Awarding attorney's fees and litigation expenses pursuant to 15 U.S.C. § 1640; and

d. Awarding costs of suit.

COUNT II

25. Plaintiff incorporates paragraphs 1 through 24 by reference.

26. Green Tree is a creditor within the meaning of the ECOA, 15 U.S.C § 1691.

27. In the form contract of Green Tree, which all consumers are required to sign for extensions of credit, is an arbitration clause which seeks to compel the resolution of all statutory causes of action in arbitration.

28. By requiring consumers to sign a contract waiving statutory causes of action, Green Tree violates 15 U.S.C.

§ 1691(a)(3) which prohibits a creditor from requiring a waiver of rights under the Federal Consumer Protection Act.

WHEREFORE, the Court should enter judgment in favor of Plaintiff and the Class and against Defendant:

a. Awarding punitive damages;

b. Awarding actual damages;

c. Awarding attorney's fees and litigation expenses; and

d. Awarding costs of suit.

COUNT III- FRAUD IN THE INDUCEMENT

29. Plaintiff incorporates paragraphs 1 through 28 by reference.

30. The arbitration agreement at issue is a fraudulent scheme engaged in by defendant for the purpose of procuring the agreement of its borrowers to an arbitration agreement without actual knowledge by the borrower. The scheme is effectuated by placing said agreement on the back of the document where it will not be easily seen.

31. Defendant's agent told plaintiff that she did not have time to read the entire contract before she signed it. On information and belief, Defendants' [sic] agents regularly encourage borrowers to sign without reading the back of the contract.

33. Defendant's superior bargaining position effectuated the arbitration contract for the purpose of denying Plaintiff and the class members their day in Court.

WHEREFORE, the Court should enter judgment in favor of Plaintiff and the Class and against Defendant by:

a. Awarding punitive damages;

b. Awarding actual damages;

c. Awarding attorney's fees and litigation expenses; and

d. Awarding costs of suit.

Respectfully submitted,

/s/ Angela L. Kimbrough
ANGELA L. KIMBROUGH
One of the attorneys for Plaintiff

OF COUNSEL:

C. Knox McLaney, III
McLANEY & ASSOCIATES, P.C.
509 S. Court Street
P.O. Box 4276
Montgomery, Alabama 36103
(334) 265-1282 (334) 265-2319 [FAX]

Lynn W. Jinks, III
JINKS, SMITHART, JACKSON & DANIEL, L.L.C.
219 N. Prairie Street
P. O. Box 350
Union Springs, Alabama 36089
(334) 738-4225 (334)738-4229 [FAX]

JURY DEMAND

Plaintiff demands trial by jury in this cause.

/s/ ANGELA L. KIMBROUGH
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISON

---

Case No. CV-96-D-11-N

LARKETTA RANDOLPH, on behalf of herself
and all others similarly situated,
*Plaintiff,*

v.

GREEN TREE FINANCIAL CORP.—ALABAMA,
*Defendant.*

---

## MOTION OF DEFENDANTS GREEN TREE FINANCIAL CORP., GREEN TREE FINANCIAL SERVICING CORPORATION AND GREEN TREE FINANCIAL CORP.—ALABAMA TO COMPEL ARBITRATION, MOTION TO STAY, OR, IN THE ALTERNATIVE, MOTION TO DISMISS

COME NOW the Defendants, Green Tree Financial Corp., Green Tree Financial Servicing Corporation and Green Tree Financial Corp.—Alabama, and move the Court to issue its order compelling the Plaintiff to arbitrate her claims against these Defendants and to stay further proceedings in this case pending resolution of the arbitration. In the alternative, the Defendants move the Court to dismiss the Complaint of the Plaintiff on the grounds that the Plaintiff's sole remedy against these Defendants is via an arbitration proceeding. As grounds for this motion, the Defendants submit the Affidavit of Kenneth Holt, the Affidavit of Brian Corey and extracts from the deposition of the Plaintiff which are being filed this date by separate submission.

/s/ Robert A. Huffaker
ROBERT A. HUFFAKER
RACHEL SANDERS-COCHRAN
Attorneys for Defendants
Green Tree Financial Corp.,
Green Tree Financial Servicing
Corporation and Green Tree
Financial Corp.—Alabama

Of Counsel:
RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
P.O. Box 270
Montgomery, Alabama 36101-0270
(334) 206-3100

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

---

Case No. CV-96-D-11-N

LARKETTA RANDOLPH, on behalf of herself and all other similarly situated,
*Plaintiff,*

v.

GREEN TREE FINANCIAL CORP.—ALABAMA,
*Defendant.*

---

# EVIDENTIARY SUBMISSION OF DEFENDANTS IN SUPPORT OF MOTION TO COMPEL ARBITRATION, MOTION TO STAY, OR, IN THE ALTERNATIVE, MOTION TO DISMISS

COME NOW the Defendants, Green Tree Financial Corp., Green Tree Financial Servicing Corporation and Green Tree Financial Corp.—Alabama, and submit the following evidence and material in support of their Motion to Compel Arbitration, Motion to Stay, or, in the Alternative, Motion to Dismiss:

1. Affidavit of Kenneth Holt attached as Exhibit 1.

2. Affidavit of Brian Corey attached as Exhibit 2.

3. Extracts from the deposition of Larketta Randolph attached as Exhibit 3.

Of Counsel
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
P.O. Box 270
Montgomery, Alabama
36101-0270
(334) 206-3100

/s/Robert A. Huffaker
ROBERT A. HUFFAKER
RACHEL SANDERS-COCHRAN
Attorneys for Defendants
Green Tree Financial Corp.,
Green Tree Financial Servicing
Corporation and Green Tree
Financial Corp.—Alabama

[EXHIBIT 1]

AFFIDAVIT OF KENNETH HOLT

STATE OF ALABAMA

MONTGOMERY COUNTY

Before me, the undersigned Notary Public in and for said state and county, personally appeared Kenneth Holt, who is known to me and who being by me first duly sworn, deposes and states as follows:

1. I am Kenneth Holt, Senior Credit Manager of Green Tree Financial Corp.—Alabama (hereinafter "Green Tree—Alabama"). I have personal knowledge of the matters and transactions set forth hereafter, and I give this Affidavit in support of the Motion to Compel Arbitration/Motion to Dismiss filed by Green Tree—Alabama in the case styled *Larketta Randolph v. Green Tree Financial Corp.—Alabama*, in the United States District Court for the Middle District of Alabama.

2. Green Tree—Alabama was incorporated on or about May 4, 1995, under the laws of the state of Delaware, and it maintains its principal place of business in Alabama. Green Tree—Alabama is a wholly owned subsidiary of Green Tree Financial Corp. ("Green Tree Corp.") Green Tree Corp. was at the time of the transactions made the basis of this suit, a corporation organized and existing under the laws of the state of Minnesota, and maintaining its principal place of business in St. Paul, Minnesota. Green Tree Financial Corp., a Delaware corporation with its principal place of business in Minnesota is the successor in interest through a merger with Green Tree Financial Corp., a Minnesota corporation. Green Tree Corp., through its predecessors and its affiliates, is engaged, among other business, in consumer finance operations in the 50 United States, including the state of Alabama.

3. In the performance of its business activities, Green Tree Corp., through its predecessors and its affiliates, purchases retail installment contracts from manufactured home dealers located in the various states in which it is engaged in the business of purchasing such installment contracts. In purchasing retail installment contracts from manufactured home dealers in Alabama, Green Tree Corp. remits payment to the dealer by check drawn on a banking institution located in Minnesota. Payments made by consumers on retail installment contracts purchased by Green Tree Corp. are processed through a payment processing company in Atlanta, Georgia.

4. In connection with the purchase of the manufactured home and the insurance which is the subject of this action, the Plaintiff executed a Manufactured Home Retail Installment Contract and Security Agreement, a copy of which is attached hereto as Exhibit 1. A copy of the retail installment contract would be maintained in the Montgomery, Alabama, office of Green Tree—Alabama, and other copies would have been distributed to Green Tree Corp.'s Loan Servicing Department, whose offices are located in St. Paul, Minnesota.

5. The installment contract executed by Larketta Randolph lists Green Tree Corp. as the assignee. Pursuant to a Servicing Agreement, Green Tree—Alabama makes collections on this installment contract and otherwise performs all customary and contractual servicing activities on the contract in behalf of Green Tree Corp.

6. The installment contract signed by the Plaintiff requires that physical damage insurance on the mobile home be obtained. The insurance obtained by the Plaintiff was a policy issued by American Family Home Insurance Company. The insurance premium for the policy of insurance was disclosed on the retail installment contract, and this premium was financed. Green Tree Corp. remitted payment

of the first year's premium by check drawn on a bank located in Minnesota made payable to Green Tree Agency in St. Paul, Minnesota. Green Tree Agency, Inc. is a corporation organized under the laws of the state of Minnesota and maintains its principal place of business in St. Paul, Minnesota, and is a wholly owned subsidiary of Green Tree Corp.

7. American Family Home Insurance Company is an insurance company organized under the laws of the state of Florida and maintains its home office in Cincinnati, Ohio. Under normal practices, the policy of insurance issued by American Home would have been delivered by mail to the Plaintiff from the home office or regional office of American Home located outside the state of Alabama. Correspondence from American Home to the Plaintiff would have been via letters and other material transmitted through the United States Mail from the home office and regional offices of American Home located outside the state of Alabama. In the event of any claims being made under the policy of insurance issued to the Plaintiff, claims adjusting and processing would have been handled by American Home from a claims office located outside the state of Alabama.

8. The mobile home purchased by the Plaintiff in the transaction made the basis of this suit was manufactured by Redmon Homes, Inc. Redmon is located in, and the mobile home was manufactured in, Georgia.

/s/ Kenneth Holt
KENNETH HOLT

SWORN TO AND SUBSCRIBED before me this 12th day of February, 1996.

[SEAL]

/s/ Pam Cornelius
NOTARY PUBLIC
MY COMMISSION EXPIRES:
2/16/97

MANUFACTURED HOME RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT (CONV. - FHA - VA)

Date 1-25 19 94 — AGREEMENT DATE: 1/31/94 — ACCOUNT # 22417247

BUYER: RANDOLPH, LARKETTA, RT 3 BOX 26, UNION SPRINGS, AL 36089
(Print full name) (No. Street) (City State Zip)

SELLER: BETTER CENTS HOME BUILDERS,INC,, 506 COLUMBUS PARKWAY, OPELIKA, AL 36801
(Dealer's name) (No. Street) (City State Zip)

ASSIGNEE: GREEN TREE FINANCIAL CORP., 324 INTERSTATE PARK DRIVE, MONTGOMERY, AL 36109
(Name of Financial Institution) (No. Street) (City State Zip)

| ANNUAL PERCENTAGE RATE (The cost of my credit as a yearly rate.) | FINANCE CHARGE (The dollar amount the credit will cost me.) | Amount Financed (The amount of credit provided to me or on my behalf.) | Total of Payments (The amount I will have paid after I have made all payments as scheduled.) | Total Sale Price (The total cost of my purchase on credit, including my down payment of) |
|---|---|---|---|---|
| 9.75 % | $ 55278.00 | $ 33033.00 | $ 88311.00 | $ 6500.00 $ 94811.00 |

My payment schedule will be:

| Number of Payments | Amount of Payments | When Payments Are Due |
|---|---|---|
| 300 | 294.37 | Monthly beginning MARCH 5th 1994 |

SECURITY: I am giving a security interest in:
X The goods or property being purchased. XX Real property located at RT 3 BOX 26 UNION SPRINGS , AL 36089

FILING FEES $ .00 LATE CHARGE: If a payment is more than 15 days late, I will be charged $ 5.00 or 5.00 of the payment, whichever is LESS

PREPAYMENT: If I pay off early I may be entitled to a refund of part of the finance charge.
ASSUMPTION: Someone buying my home may, subject to conditions, be allowed to assume the remainder of the Contract on the original terms. See the Contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

| | | |
|---|---|---|
| 1 Cash Sale Price (including taxes of) | $ 885.00 | $ 38058.00 |
| 2. Gross Trade-In | $ 4000.00 | |
| Less Amount Owed on Trade-In | $ .00 | |
| Net Trade-In | $ 4000.00 | |
| Description: Make LIBRA Year 1975 Size 60 X 12 | | |
| 3 Cash Down Payment | $ 2500.00 | |
| 4. Total Down Payment | $ | 6500.00 |
| 5. Unpaid Balance of Cash Sale Price (1 - 4) | $ | 32458.00 |
| 6. Paid to Public Officials | $ | 30.00 |
| 7 Paid to Insurance Companies | $ | 545.00 |
| 8 Paid to Appraiser | $ | .00 |
| 9. a. Paid to | $ | .00 |
| b. Paid to | $ | .00 |
| c. Paid to | $ | .00 |
| d Paid to | $ | .00 |
| e. Paid to | $ | .00 |
| f. Paid to | $ | .00 |
| g Paid to | $ | .00 |
| h Paid to | $ | .00 |
| 10 Principal Balance (5 + 6 + 7 + 8 + 9 a.-h.) | $ | 33033.00 |
| 11. Prepaid Finance Charges DISCOUNT POINTS | $ | .00 |
| | $ | .00 |
| | $ | .00 |
| | $ | .00 |
| | $ | .00 |
| 12 Amount Financed (10 - 11) | $ | 33033.00 |

Physical Damage Insurance is required but I may obtain it from anyone I want that is acceptable to you. If I get the insurance checked below from you or through you,

I will pay you $ 545.00 for insurance protection for a term of 01 years

| | | | |
|---|---|---|---|
| X | Comprehensive ($ 250.00 deductible) | | |
| X | Flood | | |
| X | Liability | X | Vendor's Single Interest |
| N/A | Other | | |
| N/A | Other | | |
| N/A | Other | | |

OPTIONAL CREDIT LIFE AND DISABILITY INSURANCE

Credit Life and Disability Insurance are not required to obtain credit and will not be provided unless I sign and agree to pay the additional cost.

The term of this insurance is 00 years.

| | | |
|---|---|---|
| N/A | Single Credit Life Insurance | $ .00 |
| N/A | Joint Credit Life Insurance | $ .00 |
| N/A | Single Credit Disability Insurance | $ .00 |
| | Total | $ .00 |

X
Signature of Buyer(s) Insured Date

1. DEFINITIONS: "I", "me" "my" means the Buyer(s). "You" "Your" "You" means the Seller. "Manufactured Home" means both the manufactured home and other property. "Contract" means this Retail Installment Contract and Security Agreement.

| Manufactured Home: NEW/USED | YEAR AND MAKE | MODEL | SERIAL NUMBER | SIZE |
|---|---|---|---|---|
| N | 1994 REDMAN | BREEZEWOOD | 11425212 | 24 X 70 |

17C330101003/103/0161HE

Washer X Dryer X Air Conditioner 930300642U Wheels/Axles

Other (Describe)

2. PURCHASE: I have the option of buying the Manufactured Home for the cash price or buying on credit. The cash price is shown above as the "Cash Sale Price", and the credit price is shown above as the "Total Sale Price". I choose to buy the Manufactured Home on credit.

3. ASSIGNMENT: If (box) is a financial institution shown as "Assignee" above, you are going to sell this Contract to that financial institution. I will make my payments to the financial institution "You" and "Your" also means the financial institution after the Contract is sold.

4. SECURITY INTEREST: I give you a security interest under the applicable certificate of title law and the applicable Uniform Commercial Code in the Manufactured Home and all property added or attached to it, to secure my obligations under this Contract. I also assign directly to you any interest I may have in any insurance policy or proceeds because covering the Manufactured Home. I agree to execute any applications for certificate of title or ownership, financing statements or other documents necessary to perfect your security interest in the Manufactured Home. I authorize you to prepare and file financing statements signed only by you to the extent allowed by law. This Contract shall constitute a counterpart thereof for authentication purposes. To the extent, if any, that any Contract (whether or not so designated) constitutes chattel paper (as such term is defined in the Uniform Commercial Code in effect in the applicable jurisdiction) no security interest in any Contract may be created in any other medium other than the counterpart labeled "Lender's Copy".

5. PAYMENTS: I will pay you the amount shown as the "Total of Payments" according to the payment schedule shown above.

6. LATE CHARGE: I agree to pay a late charge for late payment as shown above.

YOU HAVE THE OPTION TO PROVIDE SUCH PHYSICAL DAMAGE INSURANCE AS IS REQUIRED IN CONNECTION WITH THIS PURCHASE EITHER THROUGH AN EXISTING POLICY OR BY A POLICY INDEPENDENTLY OBTAINED BY YOU.

BUYER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS CONTRACT
CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

x Larketta Randolph
Signature of Buyer

X
Signature of Buyer

LARKETTA RANDOLPH

Seller, by signing below, executes this Contract and also assigns the same to the Assignee in accordance with the provisions of the Seller's Assignment set forth on the reverse side hereof. Said Seller's Assignment will also include the provisions of that paragraph set forth on the reverse side which is checked below.

BETTER CENTS HOME BUILDERS, INC
(Name of Seller)

By _____ Its _____

( X ) A. Without Recourse ( ) B. Limited Recourse ( ) C. Repurchase ( ) D. With Recourse ( ) E. Limited Repurchase
Payments Payments

BEST AVAILABLE COPY

35

8. **PREPAYMENT REFUND: I HAVE THE RIGHT TO PREPAY ALL OR PART OF THE UNPAID BALANCE OF THIS CONTRACT WITHOUT ANY PENALTY.** I understand that any prepayment in an amount less than or equal to $100.00 will be considered a prepayment of all the "Finance Charge" next applied to the next monthly payment due. Any prepayment in an amount in excess of $100.00 will be applied as a pre-payment of the "Amount Financed" of the next scheduled payment date. If I pay the Contract in full, you will give me a refund of part of the Finance Charge. Any prepaid finance charge will not be included to figure this refund. The refund will be figured by the actuarial method, except that you will assume I made all payments on the due dates. I will not get a refund if the amount is less than $1.00.

9. **NO WARRANTIES:** I agree that there are no warranties of any type covering the Manufactured Home. I am buying the Manufactured Home AS IS and WITH ALL FAULTS and THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE MANUFACTURED HOME IS WITH ME. I agree that any implied or orally or unacknowledged oral any implied warranty of fitness for a particular purpose are irrevocably excluded and do not cover the Manufactured Home. This No Warranties provision does not apply to the extent that any law prohibits it and it does not cover any separate written warranties. A statement as to model year is for identification purposes only.

10. **PROTECTION OF THE MANUFACTURED HOME:** I will: (a) keep the Manufactured Home in good condition and not commit waste; (b) pay all taxes, charges and fees that may be due for the Manufactured Home and the real estate it is located on; (c) not move the Manufactured Home from its original location without your written consent; (d) not use the Manufactured Home illegally; (e) not sell or lease the Manufactured Home without your written consent; (f) not attach the Manufactured Home to any real estate and the Manufactured Home will always be treated as personal property; and (g) not let anybody else have any interest in the Manufactured Home.

11. **INSURANCE:** I will keep the Manufactured Home insured against such risks and in such amounts as you may reasonably require with an insurance company satisfactory to you. I will arrange for you to be named as loss payee on the policy. I agree to provide you written evidence of insurance as provided by you from time to time. I agree that insurance company may make any payments due under the policy directly to you, and I direct the insurance company to do so. You may do whatever you think is necessary to be sure that any proceeds of the insurance will be used to repair the Manufactured Home or pay off this Contract. I give you a power of attorney (which I cannot cancel) so that you may do whatever you need to in order to collect the insurance proceeds. If I fail to obtain or maintain insurance, or if I fail to arrange for you to be named as loss payee, you may treat that as a default of my obligations under this Contract, and you may (but are not required to) purchase such insurance. If you purchase such insurance, I will immediately repay you for any amounts you spend in purchasing the insurance, plus interest at the highest rate of interest. If I repay you such amounts spent in purchasing the insurance within thirty (30) days, the default for my failure to provide insurance will be cured.

12. **DEFAULT:** I will be in default if: (a) I do not make a payment on time; or (b) I do not keep any of my other promises under this Contract; or (c) I file, or cause, or someone else files a case against me, under the United States Bankruptcy Code; or (d) you feel in good faith that the Manufactured Home is in danger or that I will not be able to continue my payments. The default described under (c.) does not apply if this Contract is guaranteed by the Veteran's Administration. You will give me notice of the default except when I voluntarily surrender or abandon the Manufactured Home. I will have the right to cure the default during the notice period. If I do not cure the default, you may do either or both of the following:

(a) Acceleration of Payments: You can require me to immediately pay you the entire remaining balance of this Contract less the refund described in the Prepayment Refund paragraph above.

(b) Repossession: You can repossess the Manufactured Home. Once you get possession of the Manufactured Home you may sell it. If the amount from the sale, after expenses, is less than what I owe you, I will pay you the difference. If there is any property left in the Manufactured Home when you repossess, you may dispose of it as provided by law. If no law applies you will hold it for 30 days. I must claim it within 30 days or you will dispose of it.

If I default, you can do whatever is necessary to correct my default. If you spend money to correct my default, I will pay you back immediately with interest at the contract rate of interest.

14. **ATTORNEY'S FEES:** If you hire an attorney who is not a salaried employee to collect what I owe under this Contract or to get possession of the Manufactured Home, I may be required to pay your reasonable attorney's fees plus court costs and actual out-of-pocket expenses. If state law provides for a limit on attorney's fees, I will pay only the legal limit.

15. **MISCELLANEOUS PROVISIONS:** This written Contract is the only agreement that covers my purchase of the Property. This Contract can only be modified or amended, or provisions of it waived (given up), by a written modification of this Contract, signed by you. You can decide not to use or enforce any of your rights under this Contract without losing them. For example, you can agree to let me make some payments a little late any one of this Contract cannot be enforced because of a law which prohibits it, all other parts can still be enforced. I agree to pay you all reasonable charges for the return by a depository institution of a dishonored check or other negotiable instrument to the full extent permitted by applicable law. I agree to cooperate with you if I receive any requests after closing to correct errors made concerning this Contract or the transaction and to provide any and all additional documentation deemed necessary by you to complete this transaction. I agree that you may ask for this agreement by judicial process and are entitled to attorneys' fees, costs and disbursements incident to such enforcement.

16. **WAIVER OF JURY TRIAL:** I hereby waive any right to a trial by jury that I have in any action, claim, dispute or cause of action between me and the Seller, or me and any assignee of the Seller, where such litigation arises out of, or is related to, or is in connection with any provision of this Contract whether this Contract is asserted on the basis for a claim, cross claim, counterclaim, or third party claim.

17. **ARBITRATION:** All disputes, claims, or controversies arising between us or any of our successors or assigns that arise from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The arbitrator will decide the rights and liabilities of you and me, and the dispute will not be consolidated with any other matters or arbitrated on a class basis. The arbitrator will take actions necessary to achieve the parties' individual resolution of the dispute, including but not limited to, money damages, declaratory relief, and injunctive relief. Nothing in this Contract will prevent you or me from exercising self-help remedies, including but not limited to, repossession. If you or I exercise self-help remedies, or foreclose judicially or nonjudicially on any property that is collateral for this Contract, neither you nor I will be deemed to have waived our right to arbitrate the dispute. Nothing in this Contract will prevent you or me from filing a lawsuit in small claims court. Any party to this Contract may bring an individual action in small claims court. If any part of this arbitration agreement is deemed to be invalid, unenforceable or illegal, the remainder will continue in full force and effect. **THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION HEREIN, THIS CLAUSE, OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED IN 20 (B)).** The parties agree and understand that all disputes arising under or in law, statutory law, and all other laws, including, but not limited to, all state and federal laws, rules and regulations that govern the rights of the parties, will be ruled. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything herein to the contrary, Assignee retains any right to seek judicial or any judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home in foreclosure on the Manufactured Home. Such judicial relief shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought for judicial relief. And you can bind to the provisions.

## NOTICE

**ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF, RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.**

**GUARANTY:** I guarantee that all amounts owed under this Contract will be paid when due. I will still be obligated even if any of the Buyers are released or if you waive (give up) or delay enforcement of any of your rights under this Contract. You do not have to give me notice of any such waiver, delay or release. I also have to pay your attorney's fees and other court costs of enforcing this guarantee, as set forth in paragraph 14 above.

X _____ (Signature of Guarantor)

_____ (Address)

X _____ (Signature of Guarantor)

_____ (Address)

## ASSIGNMENT

Seller hereby sells, assigns and transfers to Assignee its entire right, title and interest in the Contract and the property described therein (the "Property"), with full authority to do every act and thing necessary to collect and discharge same. To induce Assignee to purchase the Contract, Seller warrants that: (a) the Contract and Guaranty, if any, are genuine, legally valid and enforceable and arose from the sale of the Property; (b) the Contract is subject to no defense, counterclaim or setoff; (c) copies of the Contract and all other documents signed by the Buyer(s) were given to the Buyer prior to consummation; (d) Seller has complied with the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act and any regulations thereunder, and all other applicable federal, state and local laws, regulations, rules and ordinances; (e) the Buyer is not a minor and has legal capacity to execute this Contract; (f) the Property is free and clear of all liens and encumbrances except the security interest granted herein and Seller has the right to assign its interest in the Contract; (g) the security interest granted to Seller constitutes a valid first lien on the Property and has been filed or recorded according to law indicating Assignee as first secured party; (h) the down payment shown on the face hereof has been received and no part thereof was advanced directly or indirectly by Seller to Buyer; (i) all statements of fact made in the Contract and all statements made by or on behalf of the Buyer in the credit applications and any other forms relating to the Contract are true to the best of Seller's knowledge and belief; (j) Buyer has physical damage insurance in the amount of the indebtedness; (k) there have been no material changes in the Buyers' income, indebtedness or employment and no other material changes between loan approval and funding. This is a condition to Assignee funding the Contract.

Notwithstanding anything herein to the contrary, if there is a breach of any of the foregoing warranties, as solely determined by Assignee, without regard to the Seller's knowledge with respect thereto or Assignee's reliance thereon, Seller agrees unconditionally to repurchase the Contract from Assignee, upon demand, for the full amount then unpaid plus costs and expenses incurred by Assignee (adjusted for unearned finance charge in accordance with the actuarial method), whether the Contract shall then be, or not be, in default, and to indemnify, defend and hold Assignee harmless from any loss, damages or claims of any nature by reason of such breach of warranty, including attorneys' fees, court costs, disbursements and out of pocket expenses.

Seller further agrees that in the event Buyer asserts against Assignee any claim, defense or counterclaim against payment of any sum owing under the Contract or in defense of repossession on the grounds, either oral or written, that the Property is defective, not as represented to Buyer by Seller, or that Seller refuses to honor any warranty or service agreement of Seller or the manufacturer, Seller will, upon Assignee's demand, repurchase the Contract from Assignee and pay Assignee the full amount remaining unpaid (computed on unearned interest in accordance with the actuarial method) plus Assignee's costs and expenses including attorneys' fees, whether or not any such claim, defense or counterclaim shall be meritorious and without making adjudication of Buyer's claim, defense or counterclaim; and Seller also agrees to indemnify, defend and hold Assignee harmless from any such claims, including attorneys' fees, court costs, disbursements and out of pocket expense.

This liability of Seller shall not be affected by any extension, renewal or other change in the amount, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for payment thereof, or the release or non-perfection of any security therewith. Assignee shall not be bound to exhaust its recourse against Buyer or any other person or any security before being entitled to payment by the Seller hereunder. Seller waives notice of acceptance of this Agreement and notice of nonpayment and nonperformance of the Contract and any other notices required by law and waives all setoffs and counterclaims.

In addition, this Assignment includes the provisions of the paragraph below, which is checked by the Seller on the face of the Contract, provided that, if none of the paragraphs below has been checked by the Seller, this Assignment shall be considered to have been checked "With Recourse".

A. "Without Recourse". The assignment of the Contract is and shall be without recourse against the Seller except as provided above and in any dealer agreement between Seller and Assignee relating to the purchase of Contracts.

B. "Limited Recourse", in the event of default of Buyer before Buyer shall have paid the number of monthly payments under the Contract as set forth on the reverse side under "Limited Recourse", the Seller will, upon demand, repurchase the Contract from Assignee for the full amount remaining unpaid under the Contract.

C. "Repurchase". If the Assignee repossesses the Manufactured Home, the Seller will, upon demand repurchase the Contract from the Assignee for the full amount remaining unpaid under the Contract.

D. "With Recourse". The Seller unconditionally guarantees payment of the full amount remaining unpaid under the Contract, and agrees to purchase the Contract from the Assignee, upon demand, for the full amount then unpaid, whenever the Contract shall be in default.

E. "Limited Repurchase". In the event of default of Buyer before Buyer shall have paid the number of monthly payments under the Contract as set forth on the reverse side under "Limited Repurchase", the Seller will, upon demand, repurchase the Contract from the Assignee for the full amount remaining unpaid under the Contract if the Assignee repossesses the Manufactured Home.

[EXHIBIT 2]

STATE OF MINNESOTA )
COUNTY OF RAMSEY )

AFFIDAVIT OF BRIAN F. COREY

Before me, the undersigned Notary Public in and for said state and county, personally appeared Brian F. Corey, who is known to me, and who being by me first duly sworn, deposes and states as follows:

1. I am Brian F. Corey, Assistant General Counsel for Green Tree Financial Corporation. I give this affidavit in connection with the Motion to Compel Arbitration/Motion to Stay/Motion to Dismiss filed by various Green Tree affiliated companies in the case of *Larketta Randolph v. Green Tree Financial Corp.-Alabama, et al.*, Civil Action No.96-D-11-N in the United States District Court for the Middle District of Alabama. I have personal knowledge of the matters and transactions discussed hereafter.

2. One of the Defendants recently named as a Defendant in this action is Green Tree Financial Servicing Corporation. Green Tree Financial Servicing Corporation was incorporated on December 5, 1994, under the laws of the State of Delaware and it maintains its principal place of business in St. Paul, Minnesota. Green Tree Financial Servicing Corporation is a wholly owned subsidiary of Green Tree Financial Corporation, a Delaware corporation.

3. Green Tree Financial Servicing Corporation was qualified to transact business in the State of Alabama on May 5, 1997. Its business activities in the State of Alabama since the time of its qualification, have involved commercial lending and commercial financing transactions, primarily in the form of floor plan financing for retailers. Green Tree Financial Servicing Corporation has not, at any time, been involved in any consumer finance transactions in the State of

Alabama and has had no involvement in the servicing or administration of the account of the Plaintiff in this action, Larketta Randolph.

/s/ Brian F. Corey
BRIAN F. COREY

SWORN TO AND SUBSCRIBED before me this 28th day of October, 1997.

/s/ Robin L. Harris
Notary Public

My Commission Expires:
1-30-2000

[SEAL]

[EXHIBIT 3]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

---

Civil Action No. CV-96-D-11-N

---

LARKETTA RANDOLPH, on behalf
Of herself and all others Similarly situated,
*Plaintiffs,*

Vs.

GREEN TREE FINANCIAL CORPORATION,
GREEN TREE FINANCIAL SERVICING
CORPORATION AND GREEN TREE
FINANCIAL,
*Defendants.*

* * * * * *

DEPOSITION OF LARKETTA RANDOLPH, taken pursuant to stipulation and agreement before Lisa J. Nix, Registered Professional Reporter and Commissioner for the State of Alabama at Large, in the Law Offices of Rushton, Stakely, Johnston and Garrett, 184 Commerce Street, Montgomery, Alabama, on Friday, December 13, 1996, commencing at approximately 1:00 p.m.

* * * * * *

[9] A. Yes.

Q. And how long have you been operating a computer in that capacity?

A. Well, on this particular job, almost three years. But I also had to use a computer prior to the ferrosheen job. I forgot about that.

Q. Well, your lawyer and I were just talking about how computer literate we are. You apparently do know how to operate a computer and have for several years?

A. Somewhat. Mine is mostly already programmed.

Q. Do you do any programming yourself?

A. No.

Q. How long have you been operating a computer?

A. Say roughly seven years, eight years.

Q. Seven or eight years?

A. Yes.

Q. Do you have a computer at home?

A. Yes, I do.

Q. What kind of computer do you have at home?

A. Packard Bell.

[10] Q. How long have you had it?

A. Almost two years.

Q. Did you have it at the time that you bought this mobile home?

A. No, a year after.

Q. Did you have another computer at home before you bought the Packard Bell?

A. No, sir, I didn't.

Q. So was that your first personal computer?

A. Yes.

Q. What do you use the computer at home for?

A. Well, I use it for typing, too, sometime, but it's mainly for my children.

Q. But you use it for what purposes?

A. Just to play around with. That's all.

Q. Games and things of that nature?

A. Yes, sir.

Q. How did you become proficient in operating the computer? Did you have to go to some kind of a school?

A. I was trained on my job, yes.

Q. At Ampex?

A. Yes.

* * * * *

[12] [A] . . . .

Q. Where was that?

A. It was named Lois's Restaurant in Union Springs, Alabama.

Q. What other jobs have you had?

A. That's all.

Q. How far did you go in school?

A. 12th grade.

Q. Did you graduate?

A. Yes, sir, I did.

Q. What school was that?

A. Bullock County High School in Union Springs.

Q. When did you finish high school?

A. 1980.

Q. What type of a student were you in high school?

A. Fair.

Q. A's and B's?

A. A's, B's, and C's.

Q. Some C's?

A. Yeah.

Q. Did you ever have to repeat any grade?

A. No, I didn't.

[13] Q. I may not have asked you. How old are you, Ms. Randolph?

A. Thirty-four.

Q. I assume that you are able to read and write.

A. Yes, sir.

Q. Do you subscribe to any newspapers or magazines?

A. I have in the past.

Q. Which ones have you subscribed to in the past?

A. Ebony. I subscribed to Highlights for my children and Jet. That's about it that I can think of.

Q. Do you read the newspaper?

A. Yes, sir, I do.

Q. Do you take a newspaper at home or do you buy one periodically?

A. No. I read them at work.

Q. Do you normally read the newspaper every day?

A. Not every day.

Q. But most days?

* * * * *

[27] A. Yes, they're somewhere.

Q. Do you know whether the documents that you signed in connection with the purchase of the Saturn automobile or in connection with the financing of the purchase of the Saturn automobile contained an arbitration provision?

A. Well, after going through this, yes. He explained it to me.

Q. So when you bought the Saturn here in Montgomery—

A. Yes.

Q. —did they ask you to sign an arbitration agreement?

A. He explained it first, then . . .

Q. How did he explain it to you?

A. Right now, I don't know how to word it, so I'd rather not say.

Q. But he did mention arbitration?

A. Yes, sir.

Q. Now, you bought this car after you filed this lawsuit, didn't you?

A. Yes.

[28] Q. Do you know that you're making some kind of claim in this lawsuit about arbitration?

A. Now I do.

Q. When did you learn that you were making some kind of claim about arbitration in this lawsuit?

A. Last year I think it was.

Q. So had you heard of arbitration before you bought the Saturn?

A. After reading my documents about my home, I knew a little bit more about it.

Q. What I'm trying to find out is, at the time that you bought the Saturn automobile, you had heard something about arbitration—

A. Yes.

Q. —because of this lawsuit?

A. Right.

Q. Had you heard about arbitration from any other source?

A. No.

Q. So when you bought the car, the representative of the Saturn dealership asked you to sign an arbitration agreement; . . . .

* * * * *

[50][Q.] . . . . Did he mail them to you later?

A. I'm not for sure.

Q. Well, you do have some papers that relate to the purchase of your mobile home, don't you?

A. Yes.

Q. Because you've given them to your lawyer.

A. Yes.

Q. When did you read the front and back of the papers?

A. Well, I looked over the front at home.

Q. But after you got a copy of them, whether he left them with you that day or sent them to you later and after you had signed them, did you read them then?

A. After I had signed them?

Q. Yes, ma'am.

A. Or are you saying that he was there with me to sign them or . . .

Q. After you signed the papers and he gave you a copy, I thought I understood you to say that you don't remember—

A. I can't remember—

Q. —whether he gave you a copy that day.

[51] A. —right then or not.

Q. But you got them sometime later we know, because you've given a copy to your lawyer.

My question to you is, after you got them, whenever that was, did you read them at that time?

A. I went over the front and glanced over the back. The writing was real small, but I glanced over it.

Q. Did you see anything at the time you looked at it that caused you any concern?

A. Not at the time that I can recall.

Q. Do you have any insurance other than insurance on your car, your mobile home, and your life?

A. No.

Q. Have you ever been delinquent in the payments that you owed to the First National Bank?

A. No more than a day or two—well, it's not delinquent until after the past due date that they give you.

Q. . . . .

* * * * *

[63][Q.] . . . .

[Q.] Do you now say that anything that Mr. Banks said to you on that first day was false or untrue?

A. Not on the first day, no.

Q. Did you have any discussions with him on that first day about insurance on the mobile home?

A. No.

Q. Did you understand that if you bought the mobile home, you would have to have insurance on it?

A. Yes.

Q. Would you have wanted insurance on the mobile home anyway?

A. Yes.

Q. Did you understand when you bought the mobile—the very first mobile home that you bought, the one from Amos, that you had to have insurance on that mobile home?

A. Right.

Q. Did you understand that the reason why you had to have insurance on it is that if . . . .

* * * * *

[73] A. Right.

Q. Earlier he had mentioned the names of some other companies besides Green Tree, but you don't remember those names?

A. I can't remember right off the top who it was.

Q. Did he say anything in this visit to your mobile home that you now say is false or untrue?

A. Not that I can recall.

Q. I think I understand from what you have said earlier that after this visit to your mobile home, then he called you up on the telephone.

A. Right.

Q. How many days after that visit did he call you?

A. It wasn't many days after.

Q. What did he say?

A. He said that the loan had been approved and he had got it financed with Green Tree and that he would bring the paperwork down.

And I'm—I don't know how long it was . . . .

* * * * *

[75] A. Not that I can recall.

Q. Do you remember anything else he said in that telephone conversation?

A. None other than—No, that wasn't in the phone conversation I don't think. It was just because I had my single-wide underpinned with blocks, and I had

to get those away from there. But I can't remember whether that was said on the phone or when he was there.

Q. Had you been called by anybody from Green Tree asking you any questions before you signed these papers?

A. Not that I can recall.

Q. Have you told me everything that you can remember about the telephone call that you got from Mr. Banks?

A. That I can remember, yes.

Q. Do you now say that anything that he said to you in that telephone conversation was false or untrue?

A. Not that I can remember.

Q. What happened next?

* * * * *

[79] A. To make sure the figures was pretty much what he said.

Q. And were they?

A. Yes, the cost of the house and everything, yes.

Q. I think from what you told me earlier, you did not turn over the back and look at the back; is that correct?

A. Not that I can recall.

Q. Is there any reason why you could not have taken the time to do that?

A. Because he was steady talking and was talking about the interest rate and getting to Montgomery.

Q. But you could have taken the time to just flip over and look at the back, couldn't you?

A. Well, I guess I could have.

Q. Did he give you any explanation about this document, Exhibit Number One? I mean, did he explain any of the numbers to you or did he just give it to you and say take a look at it and you signed it?

[80] A. I can't remember, really.

Q. Did he say anything at all about arbitration?

A. Not that I can recall.

Q. If he had mentioned arbitration, would you have known what arbitration was?

A. No, but I would have asked probably what it meant.

Q. If he had said something about arbitration, that would have been something that you were not familiar with and you would have asked him what it was?

A. Uh-huh. (Positive response.)

Q. Is that correct?

A. Yes.

Q. But no mention was made about arbitration?

A. Not that I can recall.

(Defendant's Exhibit Three was marked for identification.)

Q. Let me show you what is marked as Defendant's Exhibit Three, which looks to be a mobile home invoice and bill of sale. I'll ask you if that has your signature on . . . .

* * * * *

Supreme Court, U.S.
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No. 99-1235

IN THE
# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF PETITIONERS

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

June 8, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration" appealable under 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals erred in concluding that an arbitration provision that was "silent" on the issue of costs and fees was unenforceable under the Federal Arbitration Act because the risk that plaintiff "might" be required to bear unknown costs and fees potentially undermined her ability to vindicate statutory rights.

## STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioners remain wholly owned subsidiaries of Conseco, Inc., an Indiana corporation whose stock is publicly traded. Petitioners further state that no publicly owned company owns ten percent or more of the stock of Conseco, Inc.

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IN THE

# Supreme Court of the United States

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GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF OF PETITIONERS

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## OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is published at 178 F.3d 1149 (11th Cir. 1999). The court of appeals' order denying the petition for rehearing (Pet. App. 55a-56a) is unpublished. The district court's memorandum opinion and order (Pet. App. 20a-50a) is published at 991 F. Supp. 1410 (M.D. Ala. 1997). The district court's order denying respondent's motion for reconsideration (Pet. App. 51a-54a) is published at 991 F. Supp. 1410, 1425-26 (M.D. Ala. 1997).

## JURISDICTION

The court of appeals entered judgment on June 22, 1999, and denied a petition for rehearing on October 28, 1999. The petition for a writ of certiorari was filed on January 21, 2000, and was granted on April 3, 2000. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The statutes relevant to this case are the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f. The relevant provisions of these statutes are reproduced in the statutory addendum attached to this brief.

## STATEMENT OF THE CASE

The question of appellate jurisdiction presented is whether an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration" and is therefore immediately appealable under 9 U.S.C. § 16(a)(3). As demonstrated below, the answer is no. The underlying purpose of the FAA, the structure of Section 16, and the existing legal framework against which Section 16(a)(3) was enacted each confirms that an order compelling arbitration in an "embedded" proceeding is not a "final decision" that is appealable under Section 16(a)(3). The court of appeals' contrary conclusion was based on snippets from the legislative history that cannot substitute for or overcome the contrary congressional intent reflected in the text, structure and purpose of Section 16 and the FAA. Nor can the district court's decision to label the order compelling the parties to arbitrate a "dismissal" "with prejudice" rather than a "stay" – a label that has no bearing on the substance of the district court's action – make an otherwise interlocutory order a "final decision" under Section 16(a)(3).

Further, assuming this matter is appealable, this case presents the question of whether the court of appeals erred in concluding that the arbitration agreement was unenforceable because its "silence" on the issue of costs and fees created the risk that respondent "might" be required to bear unknown costs and fees associated with arbitration that could undermine her ability to vindicate her statutory rights under TILA and ECOA. As demonstrated below, the court of appeals clearly erred because the arbitration agreement was not "silent" on the issue of costs and fees. It provided the arbitrator with "all powers provided by the law," and the "law" relevant to respondent's statutory claims under TILA and ECOA is clear that "the costs of the action" are a component of damages to which respondent would be entitled if she prevailed in arbitration. Indeed, even if the agreement were ambiguous, that ambiguity must be resolved in favor of arbitration. The court of appeals' contrary conclusion was based on an outdated and improper mistrust of the arbitral process that this Court repeatedly has rejected.

Moreover, respondent also argues that the arbitration agreement is unenforceable as to her TILA claim because it does not provide class action procedures. Even if respondent's challenge were properly presented, this Court previously has addressed and rejected the same argument. Further, Congress has not expressed an intent to preclude waiver of judicial remedies under TILA. Indeed, TILA authorizes parties to waive federal procedures through its grant of concurrent jurisdiction in state court. Finally, TILA provides a host of incentives to ensure that plaintiffs, such as respondent, can bring such actions individually, and they routinely do bring such lawsuits.

### *Statutory Background*

1. *The Federal Arbitration Act.* In 1925, Congress enacted the FAA to reverse centuries of judicial hostility to arbitration agreements and to allow parties to avoid "the costliness and delays of litigation" through arbitration. H.R. Rep. No. 68-96, at

1-2 (1924); see also Y2K Act, 15 U.S.C. § 6601(b)(3) (arbitration provides alternative to "costly and time-consuming litigation"). Prior to enactment of the FAA, "[t]he federal courts – like those of the States and of England – ha[d] . . . denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes" and had refused "to compel specific performance, or to stay proceedings on the original cause of action." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-21 (1924) (citations omitted). By enacting the FAA, Congress endeavored to reverse that judicial hostility through a procedure for the enforcement of arbitration agreements that was "very simple" and that would "reduc[e] technicality, delay, and expense to a minimum and at the same time safeguard[] the rights of the parties." H.R. Rep. No. 68-96, at 2. As this Court recently explained, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995); see also S. Rep. No. 68-536, at 3 (1924) (the FAA, by avoiding "the delay and expense of litigation" will appeal "to big business and little businesses, . . . corporate interests [and] . . . individuals").

Specifically, Section 2 of the FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In turn, sections 3 and 4 of the FAA provide a mechanism for enforcing that command by authorizing a court to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," *id.* § 3, or to enter an "order directing that [the] arbitration proceed in the manner provided for in such agreement," *id.* § 4.

Once arbitration has been ordered, the FAA contemplates further court involvement in connection with the ultimate arbitration award. Under Section 9, a party may file an application "for an order confirming the award" which the court "must grant

. . . unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]," *id.* § 9. In turn, Section 10 authorizes a court to "vacat[e]" an arbitral award if (i) "the award was procured by corruption, fraud, or undue means," (ii) "there was evident partiality or corruption in the arbitrators," (iii) "the arbitrators were guilty of misconduct" or (iv) "the arbitrators exceeded their powers." *Id.* § 10(a)(1)-(4); see also *First Options, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995) (court may vacate award for "'manifest disregard'" of law). Similarly, under Section 11, a court "may make an order modifying or correcting the award." 9 U.S.C. § 11(a)-(c) (setting forth reasons for modifying arbitral award). This Court has ruled that this post-award review "'is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quoting *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987)).

With respect to appellate review of arbitration orders, in 1988, Congress enacted section 16, which governs appeals of district court orders and reflects the same pro-arbitration policy evident in the substantive provisions of the FAA. Under Section 16, orders hostile to arbitration, whether interlocutory or final, are appealable immediately as of right. 9 U.S.C. § 16(a)(1), (2). Thus, a party may appeal immediately an order (i) "refusing to stay an action under section 3," (ii) "denying a petition under section 4 . . . to order arbitration to proceed," or (iii) "granting, continuing, or modifying an injunction against an arbitration." *Id.* In contrast, a party generally cannot appeal immediately an interlocutory order that favors arbitration, including an order (i) "granting a stay of any action under section 3," (ii) "directing arbitration to proceed under section 4" or (iii) "refusing to enjoin an arbitration." *Id.* § 16(b). Rather, immediate appeal of such an order is available only in extraordinary circumstances where the district court certifies the order for appeal *and* the court of appeals permits the appeal to be taken. *Id.*;

see 28 U.S.C. § 1292(b). Finally, under section 16(a)(3), an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). Section 16 does not define the phrase "a final decision with respect to an arbitration."

2. *The Truth in Lending Act.* The Truth in Lending Act ("TILA") was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). TILA requires disclosure of the "finance charge" imposed "by the creditor as an incident to the extension of credit." *Id.* § 1605(a); see also 12 C.F.R. 226.18 (setting forth "[c]ontent of disclosures" under TILA). As relevant here, TILA provides that "[c]harges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge." 15 U.S.C. § 1605(c). Such premiums, however, may be excluded from the finance charge if "a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained." *Id.*; see also 12 C.F.R. § 226.4(d)(2) & n.5 (setting forth requirements under which "[p]remiums" for "single interest insurance" "may be excluded from the finance charge"). The regulations in effect when respondent first filed suit provided that the "finance charge," in transactions such as respondent's, would "be considered accu-

rate if it [was] . . . not more than $10 above or below the exact finance charge." 12 C.F.R. § 226.18 n.41 (1996).[1]

Congress provided several avenues to vindicate the rights embodied in TILA. First, TILA provides for administrative enforcement by a host of interested federal agencies. 15 U.S.C. § 1607(a), (c). Among other things, these federal agencies may "require the creditor to make an adjustment to the account of the person to whom credit was extended, to assure that such person will not be required to pay a finance charge in excess of the finance charge actually disclosed." *Id.* § 1607(e)(1). Moreover, these agencies "shall require such an adjustment" when the error resulted from "(A) a clear and consistent pattern or practice of violations, (B) gross negligence, or (C) a willful violation." *Id.* § 1607(e)(2). Further, violators who "willfully and knowingly" fail to provide disclosures required by TILA or its regulations face criminal penalties, including a fine of $5,000, imprisonment of "not more than one year, or both." *Id.* § 1611.

In addition to these administrative and criminal remedies, TILA authorizes individuals to bring civil actions when aggrieved by a "creditor who fails to comply with any requirement imposed under this part." *Id.* § 1640(a). Individuals are offered the choice of bringing such actions "in any United States district court, or any other court of competent jurisdiction." *Id.* § 1640(e). In such a suit, a creditor who "fails to comply with any requirement imposed [by TILA] . . . with respect to any person is liable to such person [for] . . . any actual damage sustained by such person as a result of the failure." *Id.* § 1640(a)(1). In addition to actual damages, a plaintiff, such as respondent, if she prevailed, would be entitled to statutory damages of "not less than $200 or greater than $2,000," *id.*

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[1] The current TILA regulations provide that "the disclosed finance charge . . . shall be treated as accurate if [it] . . . (i) is understated by no more than $100." 12 C.F.R. § 226.18(d)(1).

§ 1640(a)(2)(A)(iii), and "the costs of the action, together with a reasonable attorney's fee," *id.* § 1640(a)(3).

TILA also imposes restrictions on the relief available to individuals who choose to represent a class of plaintiffs under Federal Rule of Civil Procedure 23. *Id.* § 1640(a). Unlike individual actions, members of a class are not guaranteed a "minimum recovery" of statutory damages, and, "in any class action or series of class actions arising out of the same failure," the maximum recovery is capped at "the lesser of $500,000 or 1 per centum of the net worth of the creditor." *Id.* § 1640(a)(2)(B). TILA provides a series of statutory factors that must be assessed in determining the proper "award in any class action." *Id.* § 1640(a). With respect to certain TILA violations, in 1995, Congress enacted a moratorium during which time "no court [could] enter any order certifying any class in any action under [TILA]." *Id.* § 1640(i).

3. *Equal Credit Opportunity Act.* The Equal Credit Opportunity Act ("ECOA") makes it unlawful for any "creditor to discriminate against any applicant . . . because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act]." 15 U.S.C. § 1691. As in TILA, the statutory requirements of ECOA are enforced by responsible federal agencies. *Id.* § 1691c(a), (c). If the federal agencies are unable to secure compliance, they "are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted." *Id.* § 1691e(g). The Attorney General, in turn, may bring a civil action "for such relief as may be appropriate, including actual and punitive damages and injunctive relief." *Id.* § 1691e(h).

As in TILA, under ECOA, an individual may recover civil damages by filing suit in "United States district court . . . or in any other court of competent jurisdiction." *Id.* § 1691e(f). Under ECOA, an aggrieved party is entitled to recover "any actual damages sustained," *id.* § 1691e(a); "punitive

damages in an amount not greater than $10,000," *id.* § 1691e(b); and "the costs of the action, together with a reasonable attorney's fee," *id.* § 1691e(d). If an individual chooses instead to bring a class action, regardless of the size of the class, punitive damages are capped at "the lesser of $500,000 or 1 per centum of the net worth of the creditor." *Id.* § 1691e(b).

### *Factual Background*

On January 25, 1994, respondent Larketta Randolph ("respondent") purchased a "manufactured" or mobile home from Better Cents Home Builders Inc. ("Better Cents"). Pet. App. 2a. Respondent financed the $38,958.00 purchase price through Petitioner Green Tree Financial Corp. — Alabama, a wholly owned subsidiary of Green Tree Financial Corporation (collectively, "petitioners"). Joint Lodging ("J.L.") 35. Respondent's retail installment contract ("Contract") with Better Cents identifies petitioner Green Tree Financial Corp. as the assignee and contains the arbitration provision that is at the center of this dispute. Pet. App. at 2a-3a. The Contract is reproduced in the Joint Lodging. J.L. 35, 37.

On the front of the Contract, directly below the names of the parties, is a box entitled "Federal Truth-in-Lending Act Disclosures," which includes the annual percentage rate for the credit, the finance charge, the amount financed, the total of the payments over the life of the loan and the total sales price. J.L. 35. Directly below that box, is a box entitled "Physical Damage Insurance," which informed respondent that "Physical Damage Insurance is required but [respondent] may obtain it from anyone [respondent] want[s] that is acceptable to [the seller]. If [respondent] get[s] the insurance checked below from [the seller] or through [the seller], [respondent] will pay [the seller] $545.00 for a term of 01 years." *Id.* The Contract reflects that the $545.00 premium would purchase "Comprehensive,"

"Flood," "Liability," and "Vendor's Single Interest" insurance. *Id.*

> Directly above the signature line, the Contract provides:
>
> CAUTION – IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

J.L. 35 (bold omitted). Above this statement, the Contract provides in prominent typeface:

> NOTICE: SEE OTHER SIDE FOR ADDITIONAL TERMS AND CONDITIONS OF THIS CONTRACT.

*Id.* (bold omitted). Respondent signed directly below these provisions. Joint Appendix ("J.A.") 35.

The arbitration agreement appears on the other side of the Contract. J.L. 37. First, it provides that "[a]ll disputes, claims, or controversies arising from or relating to this Contract or the relationships that result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s)." Pet. App. 57a. Further, it explains that, by entering into the Contract, the parties acknowledged that "[t]his arbitration Contract is made pursuant to a transaction in interstate commerce" that is "governed by the Federal Arbitration Act," *id.*, and that "[t]he parties agree and understand that they choose arbitration instead of litigation to resolve disputes." *Id.* Finally, the arbitration agreement states:

> The parties agree and understand that all disputes arising under case law, *statutory law*, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that *the arbitrator shall have all powers provided by the law* and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

*Id.* (emphasis added). The text of the arbitration agreement is reproduced at Pet. App. 57a-58a.

In January 1996, respondent filed suit in the United States District Court for the Middle District of Alabama, alleging that petitioners violated TILA by failing to disclose as a finance charge the portion of the insurance premium paid by respondent attributable to Vendor's Single Interest ("VSI") insurance. J.A. 26 (Second Amended Compl. ¶ 24). Specifically, respondent contends that the portion of the $15.00 VSI premium attributable to insuring "Green Tree's possible repossession expenses," *id.*, should have been disclosed as a finance charge rather than as an insurance premium, Opp. 2; see also J.L. 35. Thus, respondent contends that the Contract violated TILA because the $55,278.00 finance charge disclosed by petitioners in the Contract, in her view, also should have reflected a $15.00 VSI insurance premium. Opp. 2.[2] In addition to actual damages, respondent seeks "statutory damages," "costs of suit" and "attorney's fees and litigation expenses pursuant to 15 U.S.C. § 1640." J.A. 26 (Second Amended Compl. ¶ 24).

Respondent also alleges that petitioners violated ECOA because the Contract includes an "arbitration clause which seeks to compel the resolution of all statutory causes of action in arbitration." J.A. 26 (Second Amended Compl. ¶ 27).

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[2] Even accepting respondent's theory of liability, her own submissions demonstrate that her $15.00 estimate is overstated. According to respondent, the portion of the insurance premium she paid that was attributable to VSI insurance was $15.00. Opp. 2; J.L. 3. The exhibits to her Complaint make clear that this $15.00 VSI premium purchased coverage that protected the lienholder against "[c]ollision (including Upset) of the mobile home" and "[c]onversion, embezzlement and secretion of the mobile home by [respondent]," *id.* at 27. The governing regulations provide that any portion of that $15.00 VSI premium allocable to insurance for "normal property damage, concealment, confiscation, conversion, embezzlement, and skip" need not be included in the finance charge. *See* 12 C.F.R. § 226.4(d)(2) & n.5; *Regulation Z Commentary*, 3 Fed. Reserve Reg. Serv. 6-1165.2(10) (Nov. 1998).

According to respondent, by including this arbitration agreement in the Contract, Green Tree "violate[d] 15 U.S.C. § 1691(a)(3) which prohibits a creditor from requiring a waiver of rights." J.A. 26-27 (Second Amended Compl. ¶ 28). In connection with this claim, respondent seeks "punitive damages," "actual damages," "attorney's fees and litigation expenses" and "costs of suit." *Id.*

Finally, respondent requested certification of a class action of all individuals who had entered into similar agreements with petitioners. She also sought monetary damages, including attorneys' fees and recovery of litigation expenses. Pet. App. 22a, 27a.

Petitioners filed a Motion to Stay Action and Compel Arbitration. J.A. 29-30. In resolving that Motion, the district court did not address the merits of respondent's claims, but instead, focused on whether respondent could be compelled to arbitrate her claims. Pet. App. 26a n.5. After concluding that the FAA applied because the Contract satisfied the necessary interstate commerce nexus, *id.* at 23a n.4 (citing *Allied-Bruce*, 513 U.S. 265), the court explained that by enacting the FAA, Congress "manifested a 'liberal federal policy favoring arbitration agreements,'" *id.* at 24a (quoting *Gilmer*, 500 U.S. at 24-25). As a result, "'questions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration.'" *Id.* (emphasis added) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). To resolve whether respondent should be compelled to arbitrate her statutory claims, the court applied a two-part test asking "[1] whether the Parties' agreement to arbitrate reaches the statutory issues, and . . . [2] whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims." Pet. App. 27a.

*First*, the court explained that the arbitration agreement, by its terms, applied to claims arising under "'statutory law,'" and

therefore was "sufficiently broad to encompass [respondent's] TILA, ECOA, and other claims." *Id.* at 28a. *Second*, the court explained that by agreeing to arbitrate statutory claims "'a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" Pet App. 29a (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). As a result, *respondent* bore the burden of showing that Congress intended to preclude a waiver of judicial remedies. Because respondent did "not cite any provision of the text or legislative history of either the TILA or the ECOA that expressly preclude[d] waiver of judicial remedies," the court focused on whether there was evidence of a "conflict between arbitration and the statutes' underlying purpose." Pet. App. 30a. The court ruled that "'the fact that [TILA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* at 33a (quoting *Gilmer*, 500 U.S. at 32). Similarly, the court rejected as "unpersuasive" respondent's argument that 15 U.S.C. § 1691(a)(3), which bars a creditor from extending credit conditioned on the release of potential claims for TILA violations that arose in the past, rendered the arbitration provision unenforceable. *Id.* at 34a-35a.

Accordingly, the court granted petitioners' motion to compel respondent to submit her claims "to binding arbitration pursuant to the arbitration provision in her contract." Pet. App. 49a. Acknowledging that it was authorized to stay the proceedings, see 9 U.S.C. § 3, the court instead dismissed the case "with prejudice" because all of respondent's claims were to be submitted to arbitration. Pet. App. 48a. On reconsideration, the court adhered to its prior ruling, explaining that it would "gladly modify and/or vacate its [prior] Order," if warranted by a change in circumstances. *Id.* at 54a.

### *Decision Of The Court Of Appeals*

The Eleventh Circuit reversed. Pet. App. 2a. *First*, the court of appeals addressed whether the district court's order was a "'final decision with respect to an arbitration that is subject to [the FAA].'" *Id.* at 6a (quoting 9 U.S.C. § 16(a)(3)). On that issue, the court of appeals acknowledged that the majority of circuits had drawn a distinction between "'embedded'" proceedings in "which the arbitration issue arises as part of a broader action dealing with other issues," and "'independent'" proceedings, in which "the motion to compel arbitration is the only issue before the court." *Id.* at 7a, 8a (emphasis in original omitted).[3] The Eleventh Circuit recognized that these "circuits have held that orders compelling arbitration which arise in embedded proceedings must be treated as interlocutory and non-appealable, not as 'final decisions' under § 16(a)(3)." *Id.* at 7a. Moreover, it explained that at least five courts of appeals that had adopted the embedded/independent framework for analyzing finality under Section 16(a)(3) had held that "a district court's order compelling arbitration in an embedded proceeding is interlocutory and non-appealable, even if the district court dismisses the remaining claims." *Id.* at 8a-9a (emphasis in original omitted).

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[3] The court of appeals identified *eight* circuits in which orders compelling arbitration in "embedded" proceedings would be considered non-final for purposes of Section 16(a)(3). Pet. App. 7a-8a (citing *John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 525 U.S. 965 (1998); *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 525 U.S. 931 (1998); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997), *cert denied*, 525 U.S. 921 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993)).

The Eleventh Circuit "decline[d]" to adopt the majority rule, stating that the intent of Section 16 was to "clear away the deadwood" and to "furnish a clear rule for appealability of orders relating to arbitration proceedings." Pet. App. 11a, 12a. (internal quotation marks omitted). Ignoring that the "embedded/independent" framework provided just such a clear rule, the court of appeals looked instead to statements in the legislative history of Section 16 to conclude that an "'[a]ppeal can be taken from . . . a final judgment dismissing an action in deference to arbitration.'" *Id.* at 13a (omission in original) (quoting *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990)). Ultimately, the court of appeals held that the district court's "order compelling arbitration was an appealable 'final decision' under 9 U.S.C. § 16(a)(3)," *id.* at 15a.

*Second*, the Eleventh Circuit considered whether the arbitration provision was unenforceable. The court paid lip service to the "strong federal policy favoring arbitration" and recognized that the "procedural apparatus of an arbitration should not make an arbitration clause unenforceable." Pet. App. 15a (internal quotation marks omitted). Nonetheless, the court of appeals ignored these principles in ruling that the arbitration provision was unenforceable because it "fail[ed] to provide the minimum guarantees required to ensure that [respondent's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." *Id.* at 18a.

In doing so, the court of appeals did not identify any provision of TILA that would be frustrated by arbitration of respondent's claims. Nor did the court of appeals identify any record evidence that arbitration of respondent's statutory claims would result in the imposition of substantial arbitration costs that respondent would be required to bear. Indeed, the Eleventh Circuit ignored that the arbitration agreement provided that the arbitrator was authorized to award such costs to the prevailing party based on a provision in the arbitration agreement granting

the arbitrator "all powers provided by the law." Pet. App. 57a. Instead, it relied upon the *absence* of any record evidence on these issues to rule that the arbitration provision "raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum." *Id.* at 17a.

In the end, the court of appeals acknowledged that the arbitration agreement did not, by its terms, impose the costs of the proceeding on respondent and that there was *no* record evidence regarding the amount or the apportionment of those costs. Pet. App. 17a, 18a. Nevertheless, it resolved that failure of proof *against* arbitration by speculating that respondent "*might* be required to bear substantial costs of the arbitration even if she were to prevail." *Id.* at 19a (emphasis added). On this basis alone, the court of appeals declared the arbitration agreement unenforceable.

## SUMMARY OF ARGUMENT

The common thread between the two holdings of the court of appeals is the manifest hostility of the panel to arbitration. In stark contrast to both the language and plain intent of Congress embodied in the FAA and a consistent line of decisions by this Court interpreting that statute, the court of appeals' basic approach is far out of step with the applicable statutory and judicial norms strongly favoring methods of alternative dispute resolution, primarily including arbitration. Had the court of appeals faithfully attempted to promote arbitration over litigation, it is clear that the court of appeals would have concluded that it lacked jurisdiction to review the district court's order requiring the parties' dispute to be arbitrated immediately and would have resolved its "concerns" about the costs of arbitration in favor of enforcement of the parties' contract. Because the court of appeals instead allowed distrust of arbitration to animate its decision, it erred in both of its rulings. Accordingly, its judgment

should be reversed and the matter allowed to proceed in accordance with the parties' agreement to resolve this dispute through arbitration.

1. The purpose of the FAA, the structure of Section 16, and the legal framework against which the text of Section 16(a)(3) was enacted each confirms that the district court's order compelling respondent to arbitrate the merits of her claims against petitioners is not a "final decision" under Section 16(a)(3). In enacting Section 16, Congress sought to promote the FAA's strong policy in favor of arbitration by limiting the ability of parties to avoid or delay compliance with their obligations under arbitration agreements by providing for immediate appeal of orders that disfavor arbitration and generally prohibiting immediate appeal of interlocutory orders that favor arbitration. Although Congress specifically modified aspects of the appellate process that had disfavored arbitration, in Section 16(a)(3), Congress codified the existing legal framework which distinguished between "embedded" and "independent" proceedings for purposes of determining whether an order denying or compelling arbitration constituted a "final decision." Under that framework, the district court's order compelling arbitration and dismissing the lawsuit, which occurred in an embedded proceeding, is not a final decision and therefore is not appealable under Section 16(a)(3).

The district court's decision to label its order compelling arbitration a "dismissal" "with prejudice" rather than a "stay," has no bearing on the substantive effect of the ruling and should have no bearing on whether that order is appealable under Section 16(a)(3). Regardless of the label, respondent will be entitled to present the merits of her claims in arbitration, and, if she is dissatisfied with the outcome, she would be entitled to challenge the arbitral award in the same district court that compelled her to arbitrate. Indeed, this Court has held that distinctions that have no bearing on the substance of an order should have no effect on whether it is appealable. Moreover, allowing a district

court's choice of label to control whether an otherwise interlocutory order may be appealed immediately would undermine Section 16(b), which requires that such orders can be appealed only with prior authorization by both the district court *and* the court of appeals.

2. Through the FAA, Congress has expressed an emphatic federal policy in favor of enforcing agreements by private parties to arbitrate their disputes. Accordingly, a party seeking to avoid an agreed-upon obligation to arbitrate a dispute bears the heavy burden of proving (1) that the arbitration agreement, by its terms, does not apply to the dispute, or (2) that arbitration of the underlying federal statutory right is contrary to the intent of Congress.

In this case, the court of appeals, reflecting an outdated and discredited distrust of arbitration, surmised that the arbitration agreement's putative "silence" on the issue of costs and fees created a "risk" that the underlying federal statutory rights would be compromised in arbitration. That conclusion is flatly mistaken on two counts. First, the arbitration agreement was not silent on this issue. It made clear that the arbitrator "shall have all powers provided by the law" and therefore was authorized under TILA and ECOA to award respondent, if she prevailed, "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3) (TILA); *accord id.* § 1691e(d) (ECOA). Second, respondent presented no evidence to meet her burden of establishing that she would be unable in arbitration to vindicate effectively her federal statutory rights.

Finally, the Court need not address respondent's alternative claim that arbitration creates an "inherent conflict" with TILA because an individual can "effectively vindicate" her statutory rights only in class action litigation rather than individual arbitration. In any event, that argument is meritless. This Court previously has rejected precisely the same argument in the context of a challenge to arbitration under the ADEA. See *Gilmer,*

500 U.S. at 32. Moreover, as explained in *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), Congress's grant of concurrent jurisdiction in state courts under TILA constitutes "explicit authorization" for individuals to waive federal procedural rights such as federal class action procedures. See *id.* at 482. Indeed, the incentive structure reflected in TILA is designed to ensure that individuals can and will bring individual actions even if their actual damages may be relatively modest. Finally, Congress's decision to limit the damages that otherwise would be available in class actions under TILA reflects that Congress did not view class action litigation as the only procedural mechanism through which substantive rights under TILA could be vindicated.

## ARGUMENT

### I. AN ORDER COMPELLING ARBITRATION AND DISMISSING AN "EMBEDDED" PROCEEDING IS NOT A "FINAL DECISION" UNDER 9 U.S.C. SECTION 16(a)(3).

Settled principles of statutory construction confirm that the district court's order compelling the parties to arbitrate their dispute and dismissing the case is not a "final decision" within the meaning of Section 16(a)(3) of the FAA. That conclusion is confirmed by the underlying purpose of the FAA, the structure of Section 16, and the existing legal framework against which Section 16(a)(3) was enacted.

#### A. Settled Statutory Construction Principles Govern The Scope Of Appellate Jurisdiction Under Section 16(a)(3) And They Preclude An Appeal In This Case.

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting

*Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). "'[T]he meaning of statutory language, plain or not, depends on context.'" *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). As a result, the Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as "the provisions of the whole law" including "its object and policy," *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (internal quotation marks omitted). Thus, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citation omitted). Indeed, it is a "cardinal principle" of statutory construction "'to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.'" *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

Moreover, "'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); see also *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952). As a result, "'[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.'" *Kelly* v. *Robinson*, 479 U.S. 36, 47 (1986) (quoting *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986)). Put another way, a change in the existing legal framework is not to be presumed "without specific provision in the *text of the statute*." *United Sav. Ass'n*, 484 U.S. at 380 (emphasis added) (rejecting reliance on "legislative history" to sup-

port a "change in the existing rules"); cf. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 68 U.S.L.W. 4441, 4444 2000) (rejecting presumption where "language" of statute "leaves no room for clarification by [pre-existing] practice").

Application of these principles confirms that the district court's order compelling the parties to arbitrate their dispute is not a "final decision" under Section 16(a)(3).

### B. The Purpose Of The Federal Arbitration Act, The Structure Of Section 16, And The Legal Framework Against Which Section 16(a)(3) Was Enacted Confirm That An Order Compelling Arbitration In An "Embedded" Proceeding Is Not A "Final Decision" Under Section 16(a)(3).

Section 16(a) provides, in pertinent part, that: "An appeal may be taken from . . . (3) a final decision with respect to an arbitration that is subject to [the FAA]." 9 U.S.C. § 16(a)(3). Because Congress did not define "final decision," its meaning derives from its relevant context, see *Brown*, 513 U.S. at 118, which consists of (i) the FAA, whose goals Section 16 was designed to foster, (ii) the structure of Section 16 itself, and (iii) the pre-existing legal framework defining "final decision" in the context of arbitration orders.

*First*, interpretation of the term "final decision" in Section 16(a)(3) must take into account the "object and policy" of the FAA. *Dole*, 494 U.S. at 35; see also *United Sav. Ass'n*, 484 U.S. at 371. The FAA indisputably reflects a "liberal federal policy favoring arbitration agreements" that "calls for a summary and speedy disposition of motions . . . to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 29 (1983). Further, the FAA is designed to permit "'parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible.'" *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984) (quoting *Moses H.*

*Cone*, 460 U.S. at 22). As a result, agreements to arbitrate are "not to be avoided by allowing one party to ignore the contract and resort to the courts" because "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Id.* Indeed, "[b]elated enforcement of [an] arbitration clause . . . significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 225 (1985) (White, J., concurring). Earlier this year, the Court reconfirmed these principles, explaining that the FAA reflects a "'statutory policy of rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1337 (2000) (quoting *Moses H. Cone*, 460 U.S. at 23).

*Second*, and more specifically, the term "final decision" in Section 16(a)(3) also draws meaning from the pro-arbitration structure of Section 16. See *United Sav. Ass'n*, 484 U.S. at 371 (provision of statute "often" is clarified by "the remainder of the statutory scheme"). Under Section 16, an immediate appeal may be taken from orders, whether final or interlocutory, that are hostile to arbitration. 9 U.S.C. § 16(a)(1). Thus, a party can appeal immediately if a district court enters an order (i) "refusing a stay of any action" until arbitration has occurred, *id.* § 16(a)(1)(A), (ii) "denying a petition . . . to order arbitration to proceed," *id.* § 16(a)(1)(B), (iii) "denying confirmation of an award or partial award," *id.* § 16(a)(1)(D), (iv) "modifying, correcting or vacating an award," *id.* § 16(a)(1)(E), or (v) "granting, continuing, or modifying an injunction against an arbitration," *id.* § 16(a)(2).

In contrast, Section 16(b) denies an immediate appeal as of right from orders that are favorable to arbitration, including interlocutory orders (i) "granting a stay of any action" so that arbitration may proceed, *id.* § 16(b)(1), (ii) "directing arbitration to proceed under section 4," *id.* § 16(b)(2), or (iii) "refusing to enjoin an arbitration," *id.* § 16(b)(4). As to these orders, a disap-

pointed litigant either can await a "final decision" after the arbitration has taken place, *id.* § 16(a)(3), or may seek to convince the district court *and* the court of appeals that an appeal should be permitted immediately because the order satisfies the discretionary standards of section 1292(b) of title 28, *id.* § 16(b).[4] Thus, Section 16(b) precludes a district court from unilaterally deciding that an interlocutory order favoring arbitration may be appealed immediately. In sum, Section 16 reflects a pro-arbitration structure that provides for immediate appeals from orders hostile to arbitration and requires, absent grounds for mandamus or certification, that review of orders favoring arbitration await until after the arbitration has run its course.

*Third*, and most specifically, the term "final decision" in Section 16(a)(3) is a term of art with a well-developed legal meaning both generally and as applied to orders involving arbitration. See *Evans*, 504 U.S. at 259-60 & n.3; *Morrissette*, 342 U.S. at 263. The phrase "final decision" means an order "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945); *accord Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *St. Louis, Iron Mountain & S. R.R.* v. *Southern Express Co.*, 108 U.S. 24, 28-29 (1883). Applying that understanding of a "final decision," this Court has held that orders granting or denying stays of judicial proceedings so that arbitration could go forward are not final decisions. See *Schoenamsgruber* v. *Hamburg Am. Line*, 294 U.S. 454, 456 (1935) (order that required "the parties to proceed to arbitration"

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[4] Section 1292(b) provides for an appeal from an interlocutory order when "a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" *and* "[t]he Court of Appeals . . . permit[s] an appeal to be taken from such order." 28 U.S.C. § 1292(b).

and "stayed trial of the action pending filing of the award" "definitely" was "not final"); see also *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449, 450-51 (1935) (order denying a motion to stay an "action, and all the proceedings therein . . . until an arbitration should be had in accordance with the terms of the contract sued on" "was not a final judgment"); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 179 (1955) ("order denying stay could not be called a final decision under § 1291"). Further, the Court has rejected the "artificiality of resting appealability on an otherwise substanceless distinction between stays and dismissal." *Moses H. Cone*, 460 U.S. at 9 n.8.[5]

Similarly, the courts of appeals, building on this meaning of "final decision," developed a bright-line framework that distinguishes between "independent" and "embedded" proceedings for purposes of determining whether an arbitration order constitutes a "final decision." [6] For example, in *Farr & Co.* v. *CIA. Intercontinental De Navegacion de Cuba, S.A.*, 243 F.2d 342

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[5] *See also Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990) ("The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a nonappealable interlocutory order as a 'final judgment'"); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 741-42 (1976) (district court's "recital" that order was "final judgment" did not make interlocutory order immediately appealable).

[6] *See, e.g., Seacoast*, 143 F.3d at 628 (independent/embedded framework "based on finality principles that were firmly established at the time of section 16's enactment in 1988"); *Filanto*, 984 F.2d at 60 (in enacting Section 16, "Congress built upon the distinction the courts had previously recognized between so-called 'independent' proceedings and 'embedded' proceedings"); *Perera* v. *Siegal Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992) (prior to enactment of Section 16, "[m]any courts of appeals have concluded that arbitration orders in embedded proceedings constitute interlocutory and not final decisions"); *Stedor Enters., Ltd.* v. *Armtex, Inc.*, 947 F.2d 727, 729 (4th Cir. 1991) ("Before the adoption of section 16, whether an order granting or denying a motion to compel arbitration was appealable depended on whether . . . . the sole object of the suit was to determine arbitrability.").

(2d Cir. 1957), the Second Circuit held that an order compelling arbitration "in an independent proceeding" was a "final and appealable" order, whereas such an order "made in a pending suit" would be "viewed as being interlocutory." *Id.* at 345. Similarly, in *Hartford Fin. Sys., Inc.* v. *Florida Software Servs., Inc.*, 712 F.2d 724 (1st Cir. 1983) (Breyer, J.), the First Circuit relied upon the distinction between embedded and independent proceedings in assessing whether an arbitration order was "final." *Id.* at 728. While noting that some courts differed, the First Circuit held that an order compelling arbitration in an "embedded" proceeding was not "final" because such orders merely "preclude further consideration of the merits of the case until arbitration is concluded," when "the litigation in court will resume and the parties can appeal their legal questions after the court has issued a final decision." *Id.* at 729. In doing so, the *Hartford* court explained that a contrary holding "would have led to piecemeal appeals" and "would have run counter to the congressional policy of encouraging arbitration." *Id.* at 728.

In addition to providing a clear, easily-administered test, the embedded/independent framework developed by the courts of appeals prior to enactment of Section 16 was consistent with the general definition of "final decision" under this Court's precedents. Thus, in an "independent" proceeding – which seeks only an order compelling arbitration – an order compelling or denying arbitration is a "final decision" because it does, in fact, "end[] the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. In contrast, in an "embedded" proceeding – which seeks relief on the merits apart from whether the parties must arbitrate the dispute – an order compelling or denying arbitration is not a "final decision" because such a decision does not end "the litigation on the merits" or "leave[] nothing for the court to do but execute the judgment." *Id.* Rather, after the arbitration has concluded, further judicial involvement will be "necessary for this award to become enforceable." *Perera*, 951 F.2d at 784; 9

U.S.C. § 9 (governing enforcement of arbitration awards); *id.* § 10 (governing vacatur of arbitration awards). Such an order is not a "final decision" because "it remains undeniable that . . . arbitration cannot produce an enforceable result without further judicial action." *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 (2d Cir. 1961) (Friendly, J.). Indeed, this Court has acknowledged that fact, explaining that after a court has stayed an action so that arbitration may be had, further court involvement is necessary to "'to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect.'" *Cortez Byrd Chips, Inc.*, 120 S. Ct. at 1338 (quoting *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 275-76 (1932)).

Applying these principles, the order compelling arbitration in the embedded proceeding in this case is not a "final decision" under Section 16(a)(3), and therefore cannot be appealed immediately as of right. *First*, because Congress did not define "final decision," it is presumed that Congress intended to adopt the firmly established meaning of that term. See *Evans*, 504 U.S. at 259-60 & n.3. Prior to enactment of Section 16, the law among the courts of appeals, though not unanimous, firmly established that an order requiring the parties to arbitrate their dispute that was entered in an "embedded" proceeding was not a "final decision." See, *e.g.*, *Farr & Co.*, 243 F.2d at 345; *Hartford*, 712 F.2d at 728-29. More generally, there can be no dispute that an order compelling arbitration in an embedded proceeding is not a "final decision" because it does not "end[] the litigation on the merits." *Catlin*, 324 U.S. at 233; see *Lummus*, 297 F.2d at 86 ("[A]rbitration cannot produce an enforceable result without further judicial action."). As a consequence, a party aggrieved by an order to arbitrate can, after the arbitration, challenge the arbitration award, and the court that ordered the parties to arbitrate would have the "'authority to confirm the award or to set it aside.'" *Cortez Byrd Chips*, 120 S. Ct. at 1338 (quoting *Marine Transit Corp.*, 284 U.S. at 276). A contrary conclusion would authorize multiple appeals and "piecemeal" appellate review,

rather than a single appeal *after* the arbitration proceeding has occurred and *after* the district court has addressed the enforceability of the award under the FAA.

*Second*, the conclusion that an order compelling arbitration in an embedded proceeding is not a "final decision" also is warranted because that interpretation "produces a substantive effect that is compatible with the rest of the [statute]." *United Sav. Ass'n*, 484 U.S. at 371. Subsections (a)(1), (a)(2) and (b) of Section 16 reflect an unabashed pro-arbitration bias. Under subsections (a)(1) and (a)(2), orders hostile to arbitration, whether final or interlocutory, are immediately appealable as of right. 9 U.S.C. § 16(a)(1), (2). Under subsection (b), interlocutory orders that favor arbitration may not be appealed immediately as a matter of right but instead must await completion of the arbitration proceeding before they are reviewed. *Id.* § 16(b). Given this pro-arbitration structure, Congress also would have intended to give Section 16(a)(3) a similar pro-arbitration meaning. In this regard, an overly broad definition of "final decision" under Section 16(a)(3) would unduly limit the scope of subsection (b) which prohibits immediate appeals of interlocutory orders that favor arbitration.

*Finally,* the conclusion that Congress intended that Section 16(a)(3) be given a pro-arbitration construction is confirmed by the broader federal policy underlying the FAA: to promote the "'rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips*, 120 S. Ct. at 1137 (quoting *Moses H. Cone*, 460 U.S. at 23). Interpreting section 16(a)(3) to authorize immediate appeals as of right from orders compelling arbitration in embedded proceedings could, as was done in this case, "lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration sought, to eliminate." *Southland*, 465 U.S. at 7. Indeed, the FAA was designed to allow parties "'[to move] out of court and into arbitration as quickly as possible.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. at 22). In light of this "emphatic" policy in favor of arbitration, *Mitsubishi*

*Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), the phrase "final decision" should be construed to exclude orders compelling arbitration in embedded proceedings and thereby prevent litigants, such as respondent, from improperly delaying enforcement of agreed-to arbitration provisions.

The court of appeals' contrary conclusion is based upon two erroneous premises. First, the court of appeals relied on snippets from the legislative history of Section 16 to conclude that Congress intended to do away with the embedded/independent framework. Pet. App. 12a. That reliance violates the rule of construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," *Kelly*, 479 U.S. at 47, with a "specific provision in the text of the statute," *United Savings Association*, 484 U.S. at 380. Section 16 illustrates that controlling principle in practice. By enacting Section 16, Congress intended to do away with the judicially-created *Enelow-Ettelson* doctrine which governed appeals from certain interlocutory orders under 28 U.S.C. § 1292(b). Congress did so specifically in the text of Section 16 by dictating that an interlocutory order "granting a stay of any action" could not be appealed immediately as of right. 9 U.S.C. § 16(b)(1).[7] In contrast, with respect to the embedded/independent framework that the lower courts had developed to implement the "final decision" requirement, Congress did not repudiate that judicially created concept, but instead expressly adopted the same "final decision" language upon which the embedded/independent framework was predicated. Because the statutory text of Section 16(a)(3) does not purport to alter this judicially created approach, snippets from the legislative history

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[7] *See Hartford*, 712 F.2d at 726 (Breyer, J.) (explaining that the *Enelow-Ettelson* doctrine provided an exception to the rule that an order under Section 3 of the FAA is not appealable as an "injunction" under 28 U.S.C. § 1292(a)(1) "if the suit stayed pending arbitration is legal in nature rather than equitable").

cannot provide the "specific intent" necessary to establish that Congress sought to uproot the existing judicial scheme. See *United Sav. Ass'n*, 484 U.S. at 380.

Similarly, the court of appeals improperly gave controlling weight to the district court's decision to label its order compelling arbitration a "dismissal" "with prejudice," rather than a "stay" of the proceedings. Pet. App. 14a. The district court's label, however, had no bearing on any substantive right of respondent. Indeed, the district court expressly declined to resolve "the merits of the underlying claims themselves" and instead addressed solely the question whether respondent "may be compelled to arbitrate her claims." Pet. App. 26a n.5. As a result, regardless of the label, respondent will be entitled to challenge, if necessary, the outcome of the arbitration in the district court and then appeal, if necessary, the district court's decision to the court of appeals. Simply put, the label "dismissal" "with prejudice" should have no bearing on appealability under Section 16 because that label has no bearing on respondent's substantive rights. See *Liberty Mut. Ins.*, 424 U.S. at 742 (district court's decision to label interlocutory order a "final judgment" cannot control appealability of order); see also *Sullivan*, 496 U.S. at 628 n.7 (district court's "label" cannot control "appealability"); cf. *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) (label attached to dismissal order does not affect appealability).

In fact, this Court already has rejected, in a similar context, "the artificiality of resting appealability on an otherwise substanceless distinction between stays and dismissals." *Moses H. Cone*, 460 U.S. at 9 n.8. Adoption of such an "artificial" and "substanceless" distinction is even more inappropriate here because Congress could not have intended that a district court could unilaterally transform what is in substance an interlocutory order into a "final decision" merely by labeling that order a "dismissal" rather than a "stay." Indeed, such an interpretation must be rejected because it would allow a district court unilater-

ally to circumvent the requirement that interlocutory orders set forth in Section 16(b) may be appealed only if the district court *and* court of appeals agree that the requirements of 28 U.S.C. § 1292(b)(2) have been satisfied. See *Bennett*, 520 U.S. at 173 (interpretation of statute must give effect "to every clause and word of a statute . . . rather than to emasculate an entire section").

Under the FAA, petitioners are entitled to enforce their right to arbitrate by moving this dispute out of the courts "'and into arbitration as quickly and easily as possible.'" *Southland*, 465 U.S. at 7. Any appeal of the district court's order compelling arbitration in this embedded proceeding therefore must await the completion of the arbitration that the FAA and Section 16 were designed to foster.

## II. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

Contrary to the decision of the court of appeals, the agreement to arbitrate is enforceable under the FAA because it does not undermine respondent's ability to vindicate her federal statutory rights. With respect to the court of appeals' concern regarding the costs associated with arbitration, the arbitration agreement is not "silent." It provides that the arbitrator shall have "all powers provided by the law," Pet. App. 57a, and the "law" governing TILA and ECOA claims mandates that a prevailing plaintiff is entitled to recover such costs as part of her damages. But, even if the arbitration agreement were "silent" or ambiguous on this point, under the FAA, such ambiguity must be construed in favor of arbitration. As to the class action issue raised in respondent's Brief in Opposition, the Court need not address it because it is outside the questions presented and because the court of appeals never addressed it. Nevertheless, as explained below, there is no inherent conflict between individ-

ual arbitration and respondent's vindication of her statutory rights.

### A. The Federal Arbitration Act Reflects A Strong Presumption In Favor Of Arbitration Of Federal Statutory Claims.

The legal standards governing the enforceability of arbitration agreements under the FAA are well established. Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has held that this provision manifests a "'liberal federal policy favoring arbitration agreements.'" *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone*, 460 U.S. at 24). As a result of that federal policy, judicial "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" plainly is "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, 500 U.S. at 481. Indeed, under the FAA, courts employ an "emphatic policy in favor of arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, in which "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

This duty to "'rigorously enforce agreements to arbitrate,'" *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (quoting *Byrd*, 470 U.S. at 221), "is not diminished when a party bound by an agreement raises a claim founded on statutory rights," *id.*; *accord Mitsubishi*, 473 U.S. at 626. With respect to disputes implicating federal statutory law, this Court has adopted a two-part test to determine whether private parties may agree to resolve such claims through arbitration. *Id.* at 628.

*First*, because the "central purpose of the Federal Arbitration Act" is "to ensure 'that private agreements to arbitrate are enforced according to their terms,'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989)), the court must determine whether the arbitration agreement encompasses the federal statutory claims, *Mitsubishi*, 473 U.S. at 626. In conducting that inquiry, "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id.* at 626 (quoting *Moses H. Cone*, 460 U.S. at 24-25).

*Second*, the court must determine whether the party's federal statutory "claims are nonarbitrable even though it has agreed to arbitrate them." *Id.* at 628. Put another way, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted); see *McMahon*, 482 U.S. at 227. Congressional intent to preclude arbitration must be "discoverable in the text of the [federal statute], its legislative history, or an 'inherent conflict' between arbitration and the [federal statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. In particular, "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 637). The party seeking to avoid arbitration bears the burden to show plainly that the agreement to arbitrate is contrary to congressional intent. *Id.*

Applying these standards, the Court has upheld agreements to arbitrate disputes arising under the Securities and Exchange Act of 1934, *McMahon*, 482 U.S. at 238; the Securities Act of 1933, *Rodriguez de Quijas*, 490 U.S. at 483; the Sherman Act, *Mitsubishi*, 473 U.S. at 629; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *McMahon*, 482 U.S. at 242; the

Age Discrimination in Employment Act ("ADEA"), *Gilmer*, 500 U.S. at 35; and the Carriage of Goods by Sea Act ("COGSA"), *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995).

### B. Under The Federal Arbitration Act, The Arbitration Agreement Is Enforceable To Resolve Respondent's Claims Under The Truth In Lending Act And Equal Credit Opportunity Act.

Application of this two-part test confirms that Congress did not intend to preclude petitioners and respondent from agreeing to arbitrate their disputes under TILA and ECOA.

1. The broad language of the arbitration agreement plainly covers respondent's federal statutory claims. It provides:

> All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract . . . shall be resolved by binding arbitration . . . .

Pet. App. 57a. The arbitration agreement further states: "The parties agree and understand that all disputes arising under *case law, statutory law, and all other laws* . . . will be subject to binding arbitration." *Id.* (emphasis added). Plainly, respondent's claims under TILA and ECOA relate to the Contract and qualify as "disputes arising under . . . statutory law." *Id.*; cf. *Mitsubishi*, 473 U.S. at 625 (holding that parties agreed to arbitrate disputes under the Sherman Act and other federal statutes even though "the arbitration clause . . . d[id] not mention these statutes or statutes in general"); *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986). Indeed, in her Complaint, respondent has conceded that the arbitration agreement "seeks to compel the resolution of *all statutory causes of action in arbitration.*" J.A. 26 (Second Amended Compl. ¶ 27) (emphasis added). But, even if there were some doubt about the parties' intent to arbitrate respondent's claims –

and there is none – under the FAA, the parties' intentions "are generously construed as to issues of arbitrability." *Mitsubishi*, 473 U.S. at 626. In short, the broad language of the arbitration agreement encompasses respondent's statutory claims.

2. Respondent thus bears the burden of establishing that Congress, through a separate statute, "intended to preclude a waiver of judicial remedies for the statutory rights at issue," *McMahon*, 482 U.S. at 227. Respondent cannot satisfy that burden. There is nothing in the text or legislative history of TILA or ECOA to support the conclusion that Congress intended to preclude private parties from agreeing to arbitrate such claims. See *Mitsubishi*, 473 U.S. at 628. Furthermore, there is no "inherent conflict" between the arbitration agreement and respondent's vindication of her statutory rights under TILA or ECOA.

a. *Statutory Text.* The text of TILA and ECOA reflects that Congress did not consider federal procedures essential to vindicating substantive rights under these statutory schemes and therefore authorized private parties to trade the procedures of federal court for the "simplicity, informality, and expedition of arbitration." *Id.*

Both TILA and ECOA provide that the substantive federal rights protected by these statutory schemes may be enforced by individuals either "in any United States district court, or *in any other court of competent jurisdiction.*" 15 U.S.C. § 1640(e) (TILA) (emphasis added); *accord* 15 U.S.C. § 1691e(c), (f) (ECOA). In *Rodriguez de Quijas*, this Court explained that where Congress authorizes concurrent jurisdiction over federal claims in State courts – whose procedures differ from those in federal courts – Congress thereby expresses its view that federal procedures are not essential for vindication of the underlying statutory rights. 490 U.S. at 482. Specifically, the Court ruled that "the grant of concurrent jurisdiction constitutes *explicit authorization* for complainants to waive [federal procedural] protections by filing suit in state court." *Id.* (emphasis added).

Similarly, in *Gilmer*, the Court noted that "arbitration [was] consistent with Congress' grant of concurrent jurisdiction . . . to state and federal courts, because arbitration agreements, 'like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.'" 500 U.S. at 29 (quoting *Rodriguez de Quijas*, 490 U.S. at 483) (citation omitted).

Here, as in *Rodriguez de Quijas* and *Gilmer*, Congress' grant of concurrent jurisdiction in State and federal courts to address claims under TILA and ECOA "constitutes explicit authorization" to allow private parties to agree to arbitrate claims arising under these statutes. *Rodriguez de Quijas*, 490 U.S. at 482; see also *Gilmer*, 500 U.S. at 29. As this Court explained in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 473 U.S. at 628.

b. *Legislative History.* The legislative histories of TILA and ECOA do not specifically address whether individuals are precluded from agreeing to arbitrate these statutory claims. Indeed, the district court in this case explained that respondent did "not cite any provision of the text or legislative history of either the TILA or the ECOA that expressly precludes waiver of judicial remedies." Pet. App. 30a. Similarly, in the court of appeals, respondent acknowledged that "[t]here is no indication that arbitration was ever considered by Congress." Appellant's Br. 31; see *Gilmer*, 500 U.S. at 26 (adopting party's concession that "nothing in the . . . legislative history explicitly precludes arbitration").

c. "*Inherent Conflict.*" There is no "inherent conflict" between the arbitration agreement in this case and respondent's

vindication of her substantive federal statutory rights under TILA or ECOA. In reaching the contrary conclusion, the court of appeals expressed its view that the arbitration agreement was "silent" on the issue of costs and fees and that this "silence" was inconsistent with TILA because it "fail[ed] to provide the minimum guarantees required to ensure that [respondent's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." Pet. App. 18a. Specifically, the court of appeals stated that "[b]ecause the clause is silent on the subject of arbitration fees and costs, [respondent] might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim." Pet. App. 19a. That conclusion does not withstand scrutiny.

First, the court of appeals was wrong in concluding that the arbitration agreement was "silent" as to whether respondent would "be required to bear substantial costs of the arbitration." Pet. App. 19a. The arbitration agreement provides that the "arbitrator shall have *all powers provided by the law*" and that those "powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Pet. App. 57a (emphasis added). As this Court explained in *Mitsubishi*, "[w]here the parties have agreed that the arbitral body is to decide a defined set of claims which includes . . . [a federal statutory claim]," the "inten[t] of the parties" also dictates that the arbitral body will be "bound to decide that dispute in accord with the . . . law giving rise to the claim." 473 U.S. at 636-37. Because the arbitration agreement plainly encompasses respondent's federal statutory claims under TILA and ECOA, as in *Mitsubishi*, the arbitrator would be "bound to decide th[e] dispute in accord with the . . . law giving rise to the claim." *Id.* at 636-37. Applied here, that legal principle refutes any concern that respondent's award might be "undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration" because the "law giving rise to" respondent's claims under

TILA and ECOA mandates that respondent, if she prevails, will be awarded "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3) (TILA); see *id.* § 1691e(d) (ECOA) (same). In short, the arbitration agreement makes clear that respondent would be entitled to "the costs of the action, together with a reasonable attorney's fee" if she prevailed in arbitration on her TILA and ECOA claims.

Any possible doubt on this issue is resolved by this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). There, the Court considered whether the terms of an arbitration agreement authorized the award of punitive damages. *Id.* at 54. The arbitration agreement in *Mastrobuono* provided that controversies would "'be settled by arbitration in accordance with the rules . . . of the National Association of Securities Dealers [NASD].'" *Id.* at 58 n.2. Recognizing that the NASD Rules referenced in the arbitration agreement did not provide "clear authorization of punitive damages," *id.* at 61, the Court nevertheless explained that "when a court interprets . . . an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration,'" *id.* at 62 (quoting *Volt*, 489 U.S. at 476). Applying that principle, the Court held that any "ambiguity" in the arbitration agreement must be resolved to allow recovery of punitive damages. *Id.* at 64.

To the extent that there is any ambiguity in the arbitration agreement as to whether the arbitrator has authority to award respondent "the costs of the action," 15 U.S.C. § 1640(a)(3), the Court's decision in *Mastrobuono* confirms that any such ambiguity must be resolved "'in favor of arbitration,'" 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476); *accord Moses H. Cone*, 460 U.S. at 24-25. Thus, the court of appeals simply was wrong that respondent "might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim." Pet. App. 19a. The arbitration agreement expressly grants the arbi-

trator "all powers provided by the law" and the "law" upon which respondent's claims under TILA or ECOA are based makes clear that respondent, if she prevails, is entitled to an award including the "costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d). In short, far from creating an "inherent conflict" with the statutory scheme, the arbitration agreement incorporates and reinforces TILA and ECOA as they relate to the award of the "costs of the action."

Second, the court of appeals ignored these controlling standards and instead expressed its distrust of arbitration by adopting a presumption *against* arbitration. Thus, the court of appeals manufactured "serious concerns with respect to filing fees, arbitrators' costs," Pet. App. 17a, by positing a series of imagined circumstances that found no support in the record, and then concluding that the arbitration agreement was unenforceable because it failed expressly to address each of the court's worst-case hypotheses. For example, the court of appeals speculated that the arbitration agreement created unbearable risks because it did not expressly address (i) whether "filing fees [we]re required," (ii) which party bore "initial responsibility for filing fees" and (iii) whether there was a process for "waiver in cases of financial hardship." Pet. App. 17a, 18a. Such an approach would call into question thousands of arbitration agreements that do not spell out the precise procedures that an arbitrator will apply if faced with any of the innumerable issues or combinations of questions regarding the costs associated with arbitration. Moreover, the distrust of arbitration reflected in such an approach would not be limited to costs but would extend to each and every aspect of arbitration. As a result, arbitration agreements would no doubt become unwieldy and more expensive as drafters sought to cover every possible contingency for fear that a reviewing court would strike down the agreement because it was "silent" or "ambiguous" on an issue of concern to that court. In addition to being bad policy, the court of appeals' ap-

proach to interpretation of arbitration agreements is solidly foreclosed by binding precedent requiring that "'questions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration.'" *Mitsubishi*, 473 U.S. at 626 (quoting *Moses H. Cone*, 460 U.S. at 24) (emphasis added).[8]

Similarly, the court of appeals also erred by expressing concern that vindication of federal rights likely would be contingent on "who conducts the arbitration." Pet. App. 18a. That "concern" reflects nothing more than an improper mistrust of the arbitral process. The settled rule is that "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 30; *Mitsubishi*, 473 U.S. at 636. Thus, this Court has confirmed that courts may not "indulge the presumption that the . . . arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634; see also *Gilmer*, 500 U.S. at 30 (same). Such mistrust "rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants," a view that is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, 490 U.S. at 481; see *McMahon*, 482 U.S. at 231-32 (rejecting "general

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[8] *See also Mastrobuono*, 514 U.S. at 62 ("'due regard must be given to the federal policy favoring arbitration'"); *Gilmer*, 500 U.S. at 25 (FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements'"); *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) ("due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration"); *McMahon*, 482 U.S. at 226 (FAA "establishes a 'federal policy favoring arbitration'" and "requir[es] that 'we rigorously enforce agreements to arbitrate'"); *Southland*, 465 U.S. at 10 (through the FAA, "Congress declared a national policy favoring arbitration").

suspicion of the desirability of arbitration and the competence of arbitral tribunals").[9]

In addition, even if the court of appeals' distrust of the arbitral process could create a "risk" that the arbitrator might refuse to follow the substantive provisions of the federal statutory scheme – and it cannot – that possibility alone could not justify holding the arbitration agreement unenforceable. Indeed, this Court rejected a similar argument in *Vimar Sequros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995). There, the Court addressed a challenge to enforcement of a Japanese arbitration clause under the FAA based on speculation that "there [was] no guarantee foreign arbitrators w[ould] apply [the governing federal statutory scheme]." *Id.* at 539. The Court explained that such speculation was, at best, "premature" because "[a]t this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result." *Id.* at 540. Similarly, in *Mitsubishi*, the Court declined to "speculate" whether the arbitral panel would apply the correct legal standards because that issue could be addressed when a court was asked "to enforce an award." 473 U.S. at 637 & n.19. Here, as in *Vimar* and *Mitsubishi*, speculation regarding the manner in which the arbitrator will apply the governing legal standards on the issue of costs and fees cannot justify striking down the arbitration agreement before the arbitrator has been given the opportunity to address those issues in the first instance.

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[9] *See also Gilmer*, 500 U.S. at 30 (rejecting "generalized attacks on arbitration" which "'res[t] on suspicion of arbitration'"); *McMahon*, 482 U.S. at 231-32 ("It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions" because "most of the reasons given in *Wilko* have been rejected subsequently by the Court . . . ."); *Mitsubishi*, 473 U.S. at 626-27 (explaining that Court was "well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution").

Moreover, even if the arbitrator ultimately were to rule in respondent's favor, but then deny her "the costs of the action," the arbitration agreement nevertheless should be enforced because, under the FAA, respondent still could effectively vindicate her federal statutory cause of action through post-arbitration review of the arbitral award. This Court repeatedly has ruled that judicial review of arbitration awards under the FAA is "sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 32 n.4; *Mitsubishi*, 473 U.S. at 636-37 & n.19. Specifically, the FAA provides post-arbitration relief so that an aggrieved party may modify or vacate an arbitral award where the arbitrator disregards the applicable law. See 9 U.S.C. §§ 10, 11. As the Court explained in both *Gilmer* and *McMahon*, "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.'" 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232). Thus, if there were some basis for concern that an arbitrator might manifestly disregard the applicable law and refuse to award a prevailing plaintiff "the costs of the action, together with a reasonable attorney's fee," 15 U.S.C. § 1640(a)(3), post-arbitration review would remedy any such violation of the governing law.

Finally, to the extent that the court of appeals expressed "concerns" that the costs of arbitration would be "steep" or "high," that concern was unsupported and contrary to common sense. Pet App. 17a, 18a. The law is clear that the party seeking to avoid arbitration bears the burden of proof. *Gilmer*, 500 U.S. at 26. And, the record is clear that respondent failed to satisfy *her* burden on the issue of arbitration costs. Pet. App. 19a ("[W]e lack similar information about how claimants fare under Green Tree's arbitration clause."). Absent such record evidence, the court of appeals' assumption that such costs might be "steep" or "high" simply reflects a mistrust of the arbitral process that is impermissible under this Court's decisions. See, *e.g.*, *Gilmer*,

500 U.S. at 30. Moreover, the assumption underlying that mistrust – *i.e.*, that arbitration would be more costly than litigation – is directly contradicted by the findings of Congress and the experience of this Court. See, *e.g.*, Y2K Act, 15 U.S.C. § 6601(b)(3) (parties choose arbitration "to avoid costly and time-consuming litigation"); H.R. Rep. No. 97-542, at 13 (1982) *reprinted in* 1982 U.S.C.C.A.N. 765, 777 (arbitration "is usually cheaper and faster than litigation"); *Allied-Bruce*, 513 U.S. at 280 (arbitration "often would seem helpful to individuals . . . who need a less expensive alternative to litigation").[10]

### C. Respondent's Alternative Argument That Congress Intended To Preclude Individual Agreements To Arbitrate Truth In Lending Act Claims Should Be Rejected.

In her Brief in Opposition, respondent also argued that the court of appeals' conclusion that "Green Tree's arbitration clause was unenforceable" could be sustained on the alternative ground that the arbitration agreement precluded respondent from bringing her TILA claim as a class action. Opp. 19.[11] The Court need not address this argument because it was not addressed by the court of appeals and is not within the questions

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[10] Even if respondent could demonstrate that the costs of an arbitration proceeding would be greater than the costs of litigation in court, that conclusion would not affect respondent's ability to vindicate her statutory rights because, if she prevailed, she would be entitled to recover "the costs of the action." 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d). Moreover, as in *Vimar*, "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [plaintiff]." 515 U.S. at 536.

[11] Respondent did not make a similar argument with respect to her claim under ECOA in her Brief in Opposition. *See* Opp. 19-21.

presented.[12] In any event, respondent's argument regarding the availability of class action procedures in arbitration previously has been rejected by this Court and finds no support in TILA.

The arbitration agreement is enforceable because respondent may effectively vindicate through individual arbitration her statutory rights under TILA. See *Gilmer*, 500 U.S. at 28. The crux of respondent's argument is that because Congress "contemplated" that some individual might choose to bring a TILA claim in the context of a class action, Congress thereby intended to prohibit individuals from agreeing to arbitrate TILA claims individually. Opp. 19-21. As this Court explained in *Gilmer*, 500 U.S. at 32, the fact that a federal statute contemplates that individuals might bring class actions does not support the conclusion that Congress intended to preclude individual arbitration. *Id.*

In *Gilmer*, the petitioner entered into an arbitration agreement with his employer, *id.* at 23, but contended that it was unenforceable as applied to his age discrimination claim because arbitration created an "inherent conflict" with the purposes of the ADEA, *id.* at 32. Specifically, Gilmer argued that an "inherent conflict" resulted because the ADEA expressly authorized class actions, whereas class action procedures were unavailable in arbitration. *Id.*; see 29 U.S.C. § 216(b) (authorizing class actions for ADEA claims). This Court rejected that argument, holding that "'even if the arbitration could not go forward as a

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[12] Under similar circumstances, the Court has declined to address issues outside the questions presented, and may do so here. *See Roberts* v. *Galen, Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address "two alternative grounds for affirmance" that were outside the questions presented and were "[in]sufficiently developed below . . . to assess them"); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below"); *see also Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (declining to address argument regarding unenforceability of arbitration agreement where issue was not addressed below).

class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32 (alteration in original) (quoting *Nicholson* v. *CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)).

That holding is equally applicable here. TILA, unlike ADEA, does not create any statutory right to bring a class action. Rather TILA anticipates that some individuals may seek to bring their TILA claims as class actions and places a limitation on the total recovery that would otherwise be available "in any class action or series of class actions arising out of the same failure to comply by the same creditor." 15 U.S.C. § 1640(a)(2)(B). Specifically, Section 1640 caps such statutory damages at the "lesser of $500,000 or 1 per centum of the net worth of the creditor." *Id.*; see also *Amicus* Brief of the Chamber of Commerce of the United States of America at 7-8 (explaining that district court must consider host of factors when determining proper level of class relief). Thus, TILA merely recognizes that some plaintiffs may choose to proceed individually, while others may choose to proceed through a class action. Compare 15 U.S.C. § 1640(a)(2)(A) (setting limits on statutory damages in "an individual action") with *id.* § 1640(a)(2)(B) (setting limits on recovery "in any class action or series of class actions arising out of the same failure to comply"). As in *Gilmer*, the fact that Congress contemplated "the possibility" that individuals might choose to bring class actions under TILA does not mean that "'that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32.

More generally, "[b]y agreeing to arbitrate . . . a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628; see also *Rodriguez de Quijas*, 490 U.S. at 481. Applying that standard, this Court has held in a wide variety of circumstances that an agreement to

waive the procedural rules available in federal court does not prevent a party from "'effectively . . . vindicat[ing] [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (second alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637).

For example, in *McMahon*, the Court enforced an arbitration provision that waived the provision for "exclusive jurisdiction" in the district courts of the United States for a violation of the Exchange Act of 1934. 482 U.S. at 227-28. In doing so, the Court rejected the McMahons' argument that arbitration would "'weaken their ability to recover under the [Exchange] Act,'" *id.* at 231, holding instead that "the streamlined procedures of arbitration d[id] not entail any consequential restriction on substantive rights." *Id.* at 232. Similarly, in *Rodriguez de Quijas*, the Court held that the notion that arbitration procedures "weaken[ed] the protections afforded in the substantive law to would-be complainants" was "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." 490 U.S. at 481. Finally, in *Gilmer*, the Court relied upon the same "'strong endorsement of the federal statutes favoring'" arbitration to reject a "host of challenges to the adequacy of arbitration procedures." 500 U.S. at 30.

These principles apply equally to respondent's claim under TILA. Here, there can be no dispute that the class action mechanism is procedural. See Fed. R. Civ. P. 23; see also *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of the substantive claims"); *Gilmer*, 500 U.S. at 33 (characterizing argument regarding absence of class action mechanism in arbitral forum a "claimed procedural inadequac[y]"). That fact is dispositive because Congress made clear that application of federal procedures was not essential to an individual's vindication of statutory rights under TILA. Specifically, TILA provides that an individual may bring a civil ac-

tion in "any United States district court" or "any other court of competent jurisdiction." 15 U.S.C. § 1640(e). As discussed previously, "the grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive [federal procedural] protections by filing suit in state court." *Rodriguez de Quijas*, 490 U.S. at 482; see also *Gilmer*, 500 U.S. at 29. Accordingly, by granting concurrent jurisdiction in state and federal courts, Congress provided "explicit authorization" for individuals to waive federal procedural rights, including class action procedures, that are available in federal courts, but not in some state courts. See, *e.g.*, *Marx* v. *Broom*, 632 So. 2d 1315, 1322 (Miss. 1994) ("In enacting the Rules of Civil Procedure this Court intentionally omitted Rule 23, which would have covered class actions.").

Moreover, respondent is wrong in suggesting that class action procedures are somehow essential for respondent to vindicate her statutory rights under TILA. Opp. 21. In particular, respondent has argued that individual arbitration of such claims would not be "'economically feasible,'" *id.* (quoting *Roper*, 445 U.S. at 339), in light of the "imposition of potentially prohibitive [arbitration] costs," and the "the limited financial recoveries likely to be obtained," *id.* That argument ignores that Congress carefully designed a structure of incentives to ensure that plaintiffs could and would bring individual suits under TILA.

Under TILA, a complainant such as respondent who brings an individual action is entitled to recover (i) "any actual damage sustained," 15 U.S.C. § 1640(a)(1), *plus*, (ii) statutory damages of "twice the amount of any finance charge" or "not less than $200 or greater than $2,000," *id.* § 1640(a)(2)(A), *plus*, (iii) "the costs of the action, together with a reasonable attorney's fee," *id.* § 1640(a)(3). Given these incentives, it is no surprise that this Court has addressed numerous cases involving parties who brought individual lawsuits to vindicate their rights under

TILA.[13] Indeed, respondent relied upon an individual action brought under TILA to argue that "'the award of attorney's fees'" is the component of TILA necessary "'to effectuate this scheme.'" Opp. 18 (quoting *James* v. *Home Constr. Co.*, 689 F.2d 1357, 1359 (11th Cir. 1982)).[14]

Respondent was fully aware of the incentives provided by TILA for bringing an individual action and incorporated each of them into her request for "actual damages," "statutory damages," "attorney's fees and litigation expenses pursuant to 15 U.S.C. § 1640" and "costs of suit." J.A. 26 (Second Amended Compl. ¶ 24). Respondent's argument that, absent a class action mechanism, she could not effectively vindicate her statutory rights because individual arbitration would not be "economically feasible,'" Opp. 21, is particularly weak under the facts of her case. In addition to her claim under TILA, respondent also sought "actual damages," "attorney's fees and litigation expenses," "costs of suit," and "punitive damages" of up to $10,000, in connection with her allegations under ECOA. J.A. 27 (Second Amended Compl. ¶ 28); see also 15 U.S.C.

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[13] *See, e.g., Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 57 (1982); *American Express Co.* v. *Koerner*, 452 U.S. 233, 238-39 (1981); *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 208-09 (1981); *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 156 (1981); *Kirchberg* v. *Feenstra*, 450 U.S. 455, 457-58 (1981); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 558 (1980); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 358-59 (1973).

[14] For the reasons discussed in Part II.B, *supra*, the arbitrator also would be authorized to award as damages "a reasonable attorney's fee," 15 U.S.C. § 1640(a)(3). As a result, respondent's reliance on *Roper*, 445 U.S. at 339, is misplaced because there, the Court characterized, in dictum, causes of action as "not economically feasible" when the total damages recovered would be less than the "costs of litigation, particularly attorney's fees." *Id.* at 338 n.9. In contrast, TILA makes clear that a prevailing party is entitled to actual damages, statutory damages and "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C § 1640(a)(1)-(3).

§ 1691e(a), (b), (d). Given the total relief potentially available to respondent if she were to prevail in arbitration, there can be no dispute that respondent's lawsuit is "economically feasible" or that she "'effectively may vindicate [her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).[15]

Finally, TILA does not reflect any congressional intent to permit and promote class actions at all costs, but instead provides limits on the recovery available under that statute that otherwise would not apply to general class actions brought under other statutes. 15 U.S.C § 1640(a)(2)(B).[16] Indeed, in May 1995, Congress enacted a "[c]lass action moratorium" which provided that, with respect to certain TILA claims, "no court may enter any order certifying any class action." See *id.* § 1640(i). In so doing, members of Congress identified what they viewed to be the "abuse of the Truth in Lending Act through class-action suits." 141 Cong. Rec. S5614 (daily ed. Apr. 24, 1995) (statement of sponsor Sen. Mack); see also 141 Cong. Rec. H4120-21 (daily ed. Apr. 4, 1995) (statement of

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[15] Apart from the incentives TILA provides to private parties to ensure compliance with its requirements, TILA also authorizes federal agencies and the Attorney General to seek administrative and criminal sanctions for violations of TILA. 15 U.S.C. §§ 1607, 1611; *see also Amicus* Brief of the Chamber of Commerce of the United States of America 18-29 (detailing administrative enforcement mechanisms of TILA).

[16] The legislative history of the 1974 and 1976 amendments to TILA similarly confirms that Congress intended that the substantive provisions of TILA could be vindicated through individual or class actions. Congress intended that its amendments would protect creditors from potentially "enormous penalties" that would be excessive to achieving voluntary compliance with TILA. S. Rep. No. 93-278, at 14-15 (1973). Moreover, the legislative history makes clear that the Congress envisioned that "consumers" would continue to choose to "bring individual or class actions against creditors" and that amendments were not meant to "preven[t] a series of individual civil actions." *Id.* at 15, 16.

Rep. Roukema). Congress' amendments to TILA cannot be reconciled with respondent's suggestion that class action litigation is the only mechanism through which she may "effectively vindicate [her] statutory rights."

* * *

The Court's prior pronouncements on the issue of arbitrability are equally applicable here: "[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232; see *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *Mitsubishi*, 473 U.S. at 628. "Having made the bargain to arbitrate," respondent "should be held to it." *Id.*

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

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# ADDENDUM

# RELEVANT FEDERAL STATUTES

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## 9 U.S.C. § 2

Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

## 9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

## 9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that

purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

## 9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

## 9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, c. 392, 61 Stat. 672; Nov. 15, 1990, Pub. L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub. L. 102-354, § 5(b)(4), 106 Stat. 946.)

## 9.U.S.C. § 11

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, c. 392, 61 Stat. 673.)

## 9 U.S.C. § 16

Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub. L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15; renumbered Pub. L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

**15 U.S.C. § 1601**

Congressional findings and declaration of purpose

(a) Informed use of credit

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of

consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) Terms of personal property leases

The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this subchapter to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

(Pub. L. 90-321, Title I, § 102, May 29, 1968, 82 Stat. 146; Pub. L. 93-495, Title III, § 302, Oct. 28, 1974, 88 Stat. 1511; Pub. L. 94-240, § 2, Mar. 23, 1976, 90 Stat. 257.)

## 15 U.S.C. § 1640

Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any

person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to

make disclosure, except as provided in section 1641 of this title.

(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may—

(1) intervene in the action;

(2) upon intervening-

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b) of this title, section 1607(c) of this title, section 1607(e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter—

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor—

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action—

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if—

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

(Pub. L. 90-321, Title I, § 130, May 29, 1968, 82 Stat. 157; Pub. L. 93-495, Title IV, §§ 406, 407, 408(a) to (d), Oct 28, 1974, 88 Stat. 1518; Pub. L. 94-222, § 3(b), Feb. 27, 1976, 90 Stat. 197; Pub. L. 94-240, § 4, Mar. 23, 1976, 90 Stat. 260; Pub. L. 96-221, Title VI, § 615, Mar. 31, 1980, 94 Stat. 180; Pub. L. 100-583, § 3, Nov. 3, 1988, 102 Stat. 2966; Pub. L. 103-325, Title I, § 153(a), (b), Sept. 23, 1994, 108 Stat. 2195; Pub. L. 104-12, § 2, May 18, 1995, 109 Stat. 161; Pub. L. 104-29, § 6, Sept. 30, 1995, 109 Stat. 274.)

## 15 U.S.C. § 1691

Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the

Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such

action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant

credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Appraisals; copies of reports to applicants; costs

Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal.

(Pub. L. 90-321, Title VII, § 701, as added Pub. L. 93-495, Title V, § 503, Oct. 28, 1974, 88 Stat. 1521, and amended Pub. L. 94-239, § 2, Mar. 23, 1976, 90 Stat. 251; Pub. L. 102-242, Title II, § 223(d), Dec. 19, 1991, 105 Stat. 2306.)

**15 U.S.C. § 1691e**

Civil liability

(a) Individual or class action for actual damages

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class actions for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

(d) Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity

with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that—

(1) whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,

(2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

(g) Request by responsible enforcement agency to Attorney General for civil action

The agencies having responsibility for administrative enforcement under section 1691c of this title, if unable to obtain

compliance with section 1691 of this title, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. Each agency referred to in paragraphs (1), (2), and (3) of section 1691c(a) of this title shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title.

(h) Authority for Attorney General to bring civil action; jurisdiction

When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

(i) Recovery under both subchapter and fair housing enforcement provisions prohibited for violation based on same transaction

No person aggrieved by a violation of this subchapter and by a violation of section 3605 of Title 42 shall recover under this subchapter and section 3612 of Title 42, if such violation is based on the same transaction.

(j) Discovery of creditor's granting standards

Nothing in this subchapter shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

(k) Notice to HUD of violations

Whenever an agency referred to in paragraph (1), (2), or (3) of section 1691c(a) of this title—

> (1) has reason to believe, as a result of receiving a consumer complaint, conducting a consumer compliance examination, or otherwise, that a violation of this subchapter has occurred;
>
> (2) has reason to believe that the alleged violation would be a violation of the Fair Housing Act; and
>
> (3) does not refer the matter to the Attorney General pursuant to subsection (g) of this section,

the agency shall notify the Secretary of Housing and Urban Development of the violation, and shall notify the applicant that the Secretary of Housing and Urban Development has been notified of the alleged violation and that remedies for the violation may be available under the Fair Housing Act.

(Pub. L. 90-321, Title VII, § 706, as added Pub. L. 93-495, Title V, § 503, Oct. 28, 1974, 88 Stat. 1524, and amended Pub. L. 94-239, § 6, Mar. 23, 1976, 90 Stat. 253; Pub. L. 102-242, Title II, § 223(a) to (c), Dec. 19, 1991, 105 Stat. 2306.)

Supreme Court, U.S.
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No. 99-1235

IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP. — ALABAMA
and GREEN TREE FINANCIAL CORPORATION,

*Petitioners,*

*v.*

LARKETTA RANDOLPH,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF OF RESPONDENT

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 South Court Street
P.O. Box 4276
Montgomery, AL 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 North Prairie Street
P.O. Box 350
Union Springs, AL 36089
(334) 738-4225

JOSEPH M. SELLERS*
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD
& TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, DC 20005
(202) 408-4600

ANGELA L. KIMBROUGH
FORD & KIMBROUGH
104 Main Street
Eutaw, AL 35462
(205) 372-9635

*Attorneys for Respondent*

July 24, 2000

* *Counsel of Record*

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Counsel Press LLC
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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals properly held that a district court's order compelling arbitration and dismissing with prejudice the entirety of the underlying individual and class claims constitutes a "final decision" that is subject to immediate review under the Federal Arbitration Act, 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals properly held unenforceable an arbitration clause which failed to provide the plaintiff protection from the risk of bearing the costs of vindicating her statutory rights and the same opportunity to employ the class action mechanism that would have been available under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, in a judicial forum.

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## COUNTERSTATEMENT OF THE CASE

On January 25, 1994, respondent Larketta Randolph ("respondent") purchased a mobile home from Better Cents Home Builders, Inc. ("Better Cents") in Opelika, Alabama. *See* Petitioners' Appendix to Petition for Writ of Certiorari ("Pet. App.") 2a. In order to purchase her home, Ms. Randolph received financing through Green Tree Financial Corporation — Alabama, a wholly owned subsidiary of Green Tree Financial Corporation (collectively "petitioners" or "Green Tree"). *Id.* Green Tree's Manufactured Home Retail Installment Contract and Security Agreement ("contract") required Ms. Randolph to purchase "vendors single interest" insurance, which protects a vendor or lienholder against the costs of repossession in the case of a default on her loan. Pet. App. 2a; *see* Joint Lodging ("J.L.") 35, 37.[1] Ms. Randolph was charged $15 for this insurance, *see* J.L. 3, an amount which was not disclosed to her as a finance charge on her Truth in Lending statement. *See* J.L. 35, 37. The contract, in language that was supplied by Green Tree, also contains an arbitration provision which requires that disputes "arising from or relating to" the contract be resolved through arbitration. Pet. App. 2a-3a; J.L. 37. The arbitration provision is at the heart of this appeal.

The arbitration agreement appears in approximately seven point font on the back of the contract, (*see, e.g.,* font) among sixteen different provisions. J.L. 35, 37. The agreement makes no mention of whether there are additional costs associated with arbitration, their amount or who would bear those costs. Similarly, the arbitration agreement fails to state whether, by executing the mortgage agreement, Ms. Randolph agreed to waive her right to prosecute a claim as a class action under the

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1. A copy of the original signed contract appears in the parties' Joint Appendix ("J.A."). J.A. 35-36. Because the original copy of the contract is illegible, an unsigned version is reproduced in the parties' Joint Lodging. J.L. 35, 37. Green Tree has certified that the contract reproduced in the Joint Lodging is a true and correct copy of the contract ultimately signed by Ms. Randolph. J.L. 39.

Truth in Lending Act ("TILA") or the Equal Credit Opportunity Act ("ECOA"). Nor does the arbitration agreement indicate how class claims would be handled in arbitration. By contrast, in capital letters and bold font, the agreement expressly provides that Ms. Randolph would waive any right to pursue claims subject to arbitration before a jury. *See* J.L. 37.

On the day Ms. Randolph purchased her mobile home, a representative from Better Cents brought the contract to her at home and simply instructed her where to sign the document. J.A. 20-21. Ms. Randolph did not have the opportunity to read carefully the installment contract, including the arbitration clause which appeared on the back, and was not told that she was waiving any rights under the agreement. J.A. 20-21, 48-49.

On January 3, 1996,[2] Ms. Randolph filed an action in the United States District Court for the Middle District of Alabama, on behalf of herself and those similarly situated, against Green Tree for: (1) violation of TILA, 15 U.S.C. § 1601 *et seq.*, for failing to disclose the charge of $15 for "vendors single interest" as a finance charge rather than an insurance premium in the TILA disclosure statement; and (2) violation of ECOA, 15 U.S.C. §§ 1691-1691f, for requiring Ms. Randolph to waive statutory causes of action under the Federal Consumer Protection Act by compelling her to arbitrate all claims. Pet. App. 21a-22a; J.A. 22, 26-27 (Second Amended Compl. ¶¶ 1, 24, 27, 28). Green Tree responded to the complaint by moving to stay the action or have it dismissed. J.A. 29-30. Pet. App. 2a. Ms. Randolph opposed enforcement of the arbitration agreement. Pet. App. 2a. In the alternative, she asked the district court to certify a class action before referring it to arbitration. Pet. App. 4a; J.A. 22, 24-25 (Second Amended Compl. ¶¶ 13-20); J.A. 3 (Pl's Resp. & Opp. to Def.'s Mot. to Compel Arb. at 24, Docket No. 10).

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2. *See* J.A. 1 (Compl., Docket No. 1). Ms. Randolph filed amended complaints entered on December 10, 1996, J.A. 22 (Second Amended Compl.), and September 29, 1997, J.A. 10 (Amended Compl., Docket No. 40). Pet. App. 22a n.3.

On November 26, 1997, the district court issued a Memorandum Opinion and Order that, among other things, compelled arbitration, dismissed Ms. Randolph's entire complaint with prejudice and declined to certify the putative class. Pet. App. 50a. Ms. Randolph had argued that Green Tree's arbitration agreement was unenforceable because it completely thwarted her ability to vindicate her statutory rights under TILA, and it violated ECOA, by: (1) imposing on her an intolerable risk of incurring excessive arbitration costs; and (2) failing to provide for class action treatment. Pet. App. 22a, 53a; *see, e.g.*, J.A. 25 (Second Amended Compl. ¶20); J.A. 3 (Pl's Resp. & Opp. to Def.'s Mot. to Compel Arb., at 1-3, 21-24, Docket No. 10); J.A. 5 (Pl.'s Reply at 1-4, 7, Docket No. 17). The district court denied class certification, explaining that "regardless of the wisdom of denying class certification," the failure of the arbitration agreement to provide expressly for class actions precluded the court from entertaining class treatment. Pet. App. 48a.

After the district court denied class certification and ruled that Ms. Randolph's individual claim was arbitrable, she advised the court that:

> Arbitration costs are high. . . . Plaintiff simply does not have the resources to arbitrate. Therefore, Plaintiff's only option in light of [the District] Court's ruling, is to forego any claims that she may have against [Green Tree], which is precisely why this defendant requires an arbitration agreement in each and every one of its contracts.

J.A. 13 (Mot. for Reconsid. at 9, Docket No. 53). Ms. Randolph also introduced evidence that arbitration filing fees for claims below $10,000 were generally $500 and that the average arbitrator's fee per day is $700. *Id.* Green Tree never challenged the high cost of arbitration cited by Ms. Randolph, and never agreed to bear any of those costs. Pet. App. 17a-18a; *see, e.g.*, J.A. 15 (Resp. to Mot. for Reconsid. at 7-8, Docket No. 59). Again, the district court acknowledged that it was

"mindful of the apparent inequitable result of requiring arbitration of TILA and ECOA claims and of not certifying a class, particularly in light of the consumer protection purposes of the Acts. . . ." Pet. App. 53a. Nonetheless, the district court referred the entirety of Ms. Randolph's claims to arbitration. Pet. App. 4a-5a, 48a-49a. Recognizing that there were no claims that would remain before the district court after arbitration was compelled, it ordered the entire action dismissed with prejudice and directed that Ms. Randolph proceed to arbitration for the adjudication of her claims. Pet. App. 4a-5a, 48a-49a, 53a-54a. Ms. Randolph noted an appeal on behalf of herself and others similarly situated.

The Eleventh Circuit reversed the district court's order enforcing the arbitration agreement. Pet. App. 2a. First, the court of appeals held that the "order compelling arbitration was an appealable 'final decision' under 9 U.S.C. § 16(a)(3)" and thus the court had jurisdiction to consider the matter. Pet. App. 2a, 15a. While recognizing the logic of treating orders compelling arbitration as interlocutory where there remain other issues for the district court to resolve — as is the case in most "embedded" proceedings — the Eleventh Circuit concluded that such a "myopic" approach was unwarranted where the district court referred all outstanding claims to arbitration, leaving nothing further for the district court to adjudicate. Pet. App. 8a. In particular, the circuit court concluded:

> In cases like this one . . . where the district court's dismissal of the action leaves no additional issues for it to resolve, treating the distinction between embedded and independent proceedings as decisive makes less sense.

Pet. App. 8a. Refusing to accord the same "talismanic significance" that other circuits have to the distinction between "independent" and "embedded" proceedings, the Eleventh Circuit concluded that the district court's ruling was a final decision, subject to immediate review. Pet. App. 10a-15a.

Second, while recognizing the federal policy in favor of enforcing arbitration agreements, the Eleventh Circuit properly considered the propriety of an arbitration agreement that effectively foreclosed the exercise of statutory rights under TILA and ECOA. Although the Eleventh Circuit determined that Ms. Randolph's claims fell within the scope of the agreement, it reversed the order compelling arbitration because the agreement "fail[ed] to provide minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." Pet. App. 18a. This narrowly-worded holding turned on the wording of the agreement and did not foreclose the arbitration of claims arising under TILA or ECOA or the enforcement of arbitration agreements that are properly worded. *Id.*

Although the parties briefed the separate issue of whether the arbitration agreement was unenforceable because it failed to preserve the right of Ms. Randolph and others similarly situated to prosecute their claims as a class action, the Eleventh Circuit did not reach that issue.

## SUMMARY OF ARGUMENT

1. The court of appeals properly found that the district court's decision to dismiss Ms. Randolph's case with prejudice was a final decision, subject to immediate review under 9 U.S.C. § 16(a)(3) of the Federal Arbitration Act ("FAA"). 9 U.S.C. § 16(a)(3) (1999). That conclusion is confirmed by the plain language of Section 16(a)(3), which permits appeals from a "final decision," and the prior case law interpreting the term "final decision," by the statutory construction, and by legislative history of Section 16(a)(3).

In enacting Section 16, Congress sought to "clear away the deadwood" and arcane distinctions that had governed appeals of orders relating to arbitration proceedings. Unlike the other parts of this section, Section 16(a)(3) provides that appeals may be taken from a "final decision with respect to an arbitration. . . ." Although Section 16 does not define the term "final decision,"

the Eleventh Circuit properly looked for guidance from the traditional definition of finality given to 28 U.S.C. § 1291, rather than from muddied distinctions between "embedded" and "independent" proceedings, which the balance of Section 16 was enacted to resolve. Pet. App. 10a-11a. Section 1291 permits an appeal from an order that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). By referring Ms. Randolph's claims to arbitration and dismissing the action with prejudice, the district court ended the litigation on the merits in that court. Drawing upon the meaning ascribed to "final decision" in Section 1291 to interpret Section 16(a)(3), the Eleventh Circuit properly held that the decision below was appealable.

Apart from the nearly universal application of this standard of finality, the Eleventh Circuit's approach has the additional virtue of permitting the courts of appeals to focus on the effect of the lower courts' rulings, which is to put a party out of court, not the labels attached to the decisions, in determining whether appeals should be taken. Like orders that dismiss actions so the litigation may be pursued in another forum, which are final and appealable under Section 1291, the dismissal of Ms. Randolph's case was appealable because there was nothing left of her claims after they had been referred to arbitration.

Nor does the policy favoring the enforcement of arbitration agreements dictate a different conclusion. While most of Section 16 was enacted with the goal of postponing appeals of orders compelling arbitration until the proceeding concludes, it is clear that Congress had another purpose for Section 16(a)(3). Moreover, the appeal from the dismissal with prejudice of Ms. Randolph's case is no different from appeals, under Section 16(a)(3), that Green Tree concedes may be taken from orders compelling arbitration in independent proceedings.

The legislative history may very well be dispositive of the interpretation given to Section 16(a)(3). That history reflects that it was Congress' intent that:

> [U]nder the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from . . . a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court.

*See* 134 Cong. Rec. 31,039, 31,065 (1988). Section 16(a)(3) applies equally whether the district court order favors litigation or arbitration and the legislative history confirms that Congress intended to adopt the traditional definition of finality. Accordingly, the Eleventh Circuit correctly held that the district court's order dismissing the entirety of the case before it in deference to arbitration was an appealable, final order under Section 16(a)(3) of the FAA.

2. Although the FAA reflects a federal policy favoring the enforcement of arbitration agreements, its command is not unlimited. Agreements whose terms would undermine, or work a prospective waiver of, the underlying statutory rights may not be enforced. Arbitration must also afford parties a forum that is an adequate alternative to the judiciary for the adjudication of their statutory rights. Green Tree's arbitration agreement failed to comport with these fundamental principles.

By being silent on the amount and allocation of the costs of arbitration, Green Tree's agreement failed to protect Ms. Randolph from the imposition of prohibitive costs. The record below confirmed that the costs to which Ms. Randolph could have been exposed had she proceeded to arbitration would have far exceeded the economic value of her claims. In requiring Ms. Randolph to risk the payment of prohibitive costs as a condition of proceeding to arbitration, Green Tree's agreement chilled the exercise of her statutory rights under TILA and ECOA. Had Green Tree's arbitration agreement been enforced, it would have effectively worked a prospective waiver of her statutory rights. Ms. Randolph's declared intention to abandon her claim if it proceeded to arbitration, because of the potential

costs she would bear, confirmed the effect of this waiver. Moreover, by exposing Ms. Randolph to costs that she would not have borne in the district court, the arbitration provided by Green Tree's agreement was no longer comparable to a judicial forum. The Eleventh Circuit was correct, therefore, it refusing to enforce Green Tree's arbitration agreement.

As an alternative ground for affirming the Eleventh Circuit's ruling, the failure of Green Tree's arbitration agreement to permit Ms. Randolph and others similarly situated to prosecute their TILA claims as a class action, deprived them of the only economically viable way to exercise their statutory rights. Left with claims whose economic damages are modest, the members of the class Ms. Randolph sought to represent will lack the economic incentive to pursue their claims individually. Once again, Green Tree's arbitration agreement effectively will have caused an impermissible waiver of statutory rights. Since Congress expressly contemplated that the potential for class-wide liability would be necessary to secure voluntary compliance with TILA, enforcement of Green Tree's arbitration agreement without the prospect for proceeding collectively will undermine the enforcement scheme contemplated by Congress. Although the Eleventh Circuit did not rely on this ground for invalidating Green Tree's arbitration agreement, the issue is properly before the Court since it was litigated before the district court, briefed and argued before the Eleventh Circuit and presented in Ms. Randolph's Opposition to Green Tree's Petition for Writ of Certiorari.[3] Accordingly, the Eleventh Circuit's decision denying enforcement of Green Tree's arbitration agreement may be affirmed on this ground too.

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3. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("[W]ithout cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'") (citation omitted); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983) ("[The Supreme Court] could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision[,]" especially where ground presented was raised below); *see, e.g., Langnes v. Green*, 282 U.S. 531, 539 (1931).

## ARGUMENT

### I. THE ELEVENTH CIRCUIT PROPERLY FOUND THAT AN ORDER DISMISSING AN ACTION WITH PREJUDICE WAS A FINAL DECISION UNDER 9 U.S.C. § 16(a)(3).

The court of appeals properly found that the district court's decision to dismiss the case with prejudice was a final decision, subject to immediate review under Section 16(a)(3) of the FAA. 9 U.S.C. § 16(a)(3). That conclusion is confirmed by the plain language of Section 16(a)(3) and the prior case law interpreting the term "final decision," by the statutory construction of Section 16(a)(3), and by the legislative history of this section's enactment.

#### A. The Plain Language Of Section 16(a)(3) And Prior Case Law Interpreting The Term "Final Decision" Indicate That A Dismissal With Prejudice Is A Final Decision.

Invoking Section 16(a)(3) of the FAA, the Eleventh Circuit held that by referring the entirety of Ms. Randolph's statutory claims to arbitration, leaving nothing further to adjudicate, the district court's ensuing dismissal of the action with prejudice qualified as a final decision subject to appeal. Pet. App. 14a-15a. Section 16(a)(3) allows appeals where there has been "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). While Section 16 of the FAA does not define the term "final decision," the meaning of that term has been well established for over half a century. As Green Tree concedes, "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing . . . interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

Plainly, action by a court qualifies as a final decision, subject to appeal, when it disposes of the issues before the court in their entirety. *See Catlin*, 324 U.S. at 233 (action qualifies as "final decision" when it "ends litigation on the merits and leaves

nothing for the court to do but execute the judgment"). The same standard has long governed the standard route for appeals from final decisions taken pursuant to Section 1291. *See* 28 U.S.C. § 1291 (stating that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.") Under Section 1291, a final, appealable decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers*, 437 U.S. at 467 (quoting *Catlin*, 324 U.S. at 233); 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.6, at 526-27 (2d ed. 1992) (stating that an order granting dismissal of all claims among all parties is ordinarily final).[4]

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4. Finality, of course, must be assessed in practical terms. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Thus, orders which effectively send parties out of court are deemed to "end litigation on the merits" and, therefore, qualify as final and appealable. *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986); *Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir. 1983). Similarly, the disposition of a case is final where it dispatches the case from the court, regardless of whether it is being pursued in another forum. *See Mazanec v. North Judson-San Pierre School Corp.*, 750 F.2d 625, 627 (7th Cir. 1984) (Posner, J.). In explaining that a dismissal is final when "there is nothing left of the matter in the federal court," the Seventh Circuit stated:

> The fact that the matter is being pursued before another tribunal is irrelevant. . . . [W]hen a suit in federal court is dismissed on the ground that a state court, or an arbitration board, or an administrative agency has exclusive jurisdiction over the subject matter of the suit, the order of dismissal is a final and appealable order, even though it contemplates further proceedings on the plaintiff's claim in another forum.

*Id. See also, e.g.*, *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (" 'dismissal [under] . . . [*forum non conveniens*] or any other principle puts an end to the action and hence is final and appealable' ") (quoting *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949) (second alteration in original); *Lopez v. Dean Witter Reynolds*, 805 F.2d 880, 883 (9th Cir. 1986) (order compelling arbitration of all claims is dispositive of the case and is final).

Consistent with this well-established doctrine, the Eleventh Circuit interpreted the term "final decision" in Section 16(a)(3) of the FAA by looking to the "simplest traditional definition of finality: [whether] the decision has disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order." Pet. App. 10a (citing 15B Wright *et al.*, *supra* § 3914.17, at 18-19.) The court of appeals noted that while a number of circuits have "adhered, with a concededly 'myopic[]' focus, to the embedded/independent distinction in determining whether they had jurisdiction to hear an appeal under § 16(a)(3)," Pet. App. 8a (citing *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1213 (7th Cir.), *cert. denied*, 525 U.S. 931 (1998)), nothing in the plain language of the statute requires the courts to make such a distinction decisive.[5] *See* Pet. App. 11a. Instead, the court was informed by the definition of "final decision" which was of long standing when Congress enacted Section 16(a)(3), rather than be guided by the same degree of "talismanic significance," *Napleton*, 138 F.3d at 1211, that other circuits placed on the difference between independent and embedded proceedings. *See* Pet. App. 10a. Congress was well aware of the prior interpretation of final decision when it enacted Section 16(a)(3) and chose to incorporate the term. The action taken by the district court plainly satisfied this standard.

In the district court proceedings, in response to Ms. Randolph's complaint, Pet. App. 4a, Green Tree moved to compel arbitration and to stay the proceedings, or in the alternative, to dismiss the litigation. *See* Pet. App. 22a.

5. Several circuits have held that where a proceeding is "independent" (*i.e.*, where "the motion to compel arbitration . . . is the only claim before the district court"), a final decision ending such litigation is appealable immediately. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994); *see also Filanto S.p.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). Other circuits have held that where a proceeding is "embedded" (*i.e.*, where the "arbitration issue arises as part of a broader action dealing with other issues"), an order compelling arbitration must be treated as *de facto* interlocutory and not appealable under Section 16(a)(3), despite a stay or dismissal of the underlying claims. *See* Pet. App. 7a.

Thereafter, the district court entered an order which granted Green Tree's motion to compel arbitration, referring both statutory claims to arbitration and denying Green Tree's motion to stay. Because it had disposed of the entirety of Ms. Randolph's claims by referring them to arbitration, leaving nothing before it to adjudicate, the district court also granted Green Tree's motion to dismiss the entire complaint *with prejudice.* Pet. App. 50a.

In recognizing that the dismissal with prejudice of Ms. Randolph's claims qualified as a final decision under the traditional definition of finality, the panel below hardly stood alone. *See Morewitz v. West of England Ship Owners Mutual Protection and Indem. Ass'n.*, 62 F.3d 1356, 1361 (11th Cir. 1995) (court of appeals has jurisdiction to hear appeal under Section 1291 because a dismissal with prejudice of an arbitration case is a final decision); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991) (court of appeals has jurisdiction from a final order pursuant to Section 1291 because "district court's dismissal of . . . action plainly signifies that this arbitration is not a part of any ongoing proceeding"); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988) (court of appeals has jurisdiction from district court order dismissing case and ordering arbitration); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153 (4th Cir. 1977) (order dismissing complaint with prejudice, that requested union be compelled to arbitrate and other underlying claims, is final appealable order under Section 1291).[6] Drawing upon the meaning ascribed to

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6. Even dismissals *without prejudice* may be considered final decisions under Section 1291. *See, e.g., Peterson v. BMI Refractories*, 132 F.3d 1405, 1411 (11th Cir. 1998) (finding dismissal of embedded arbitration case without prejudice was final order for purposes of jurisdiction under Section 1291); *Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) (finding that dismissal without prejudice would be treated as final order under Section 1291 given that plaintiff was not allowed to amend complaint to defeat a statute of limitations bar and

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"final decision" in Section 1291, therefore, the Eleventh Circuit was well justified in allowing an appeal from the dismissal with prejudice below pursuant to Section 16(a)(3) of the FAA.[7]

Dwelling on the same debate that the enactment of Section 16 was designed to resolve, Green Tree clings to the outmoded distinction between "embedded" and "independent" proceedings to contend that the district court's dismissal with prejudice of Ms. Randolph's claims was a non-appealable order. *See* Brief of Petitioners ("Pet. Br.") 23-25. Prior to the enactment of Section 16 of the FAA in 1988, the courts had grappled with

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court must have intended this order to end the case); *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746 (9th Cir. 1993) (stating that if the court intended the dismissal of the complaint to dispose of the entire embedded action in deference to arbitration, that dismissal may be considered a final order).

7. Green Tree's position would deny Ms. Randolph any appeal from the decision referring her statutory claims to arbitration. Ms. Randolph informed the district court that the expected costs of arbitration would have been prohibitive. Accordingly, Ms. Randolph represented in briefing that, if she were compelled to proceed through arbitration alone, rather than on behalf of a class, and without protection against large costs, she would have to "forego any claims that she may have against [Green Tree]." J.A. 13 (Mot. for Reconsid. at 9, Docket No. 53). Where the terms and conditions of arbitration are prohibitive, therefore, the postponement of appellate review of arbitrability until after arbitration concludes would deprive Ms. Randolph and others similarly situated of *any* appeal. This constitutes another basis for concluding that the dismissal of Ms. Randolph's action qualified as an appealable order. *See, e.g., Coopers*, 437 U.S. at 471 (under "death knell" doctrine, "if the court concludes that the ruling, as a practical matter, makes further litigation improbable, it is considered a final decision"); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1249 (9th Cir. 1997) (Pregerson, J., dissenting) (denial of class certification in TILA case brought by senior citizens with modest claims forced them to proceed individually through costly arbitration or abandon their claims, "effectively sound[ing] a death knell for the entire action."), *cert. denied*, 525 U.S. 921 (1998).

the issue of when appeals could be taken from orders granting or denying stays of statutory claims in deference to arbitration, pursuant to Section 3 of the FAA, and orders granting or denying motions to compel the arbitration of a dispute, pursuant to Section 4 of the FAA. *Cf., Hartford Fin. Sys., Inc. v. Florida Software Servs. Inc.*, 712 F.2d 724, 726 (1st Cir. 1983) (Breyer, J.) (stating that "[u]nder these circumstances, appealability is determined by the arcane but detailed set of rules applying the 'appealability' provisions of §§ 1291 and 1292 to §§ 3 and 4 of the Arbitration Act"). Appellate courts were divided as to when Section 4 motions to compel arbitration, which were brought in conjunction with Section 3 motions to stay while litigation proceedings were ongoing, were independent proceedings and therefore appealable or were embedded proceedings and therefore unappealable. *See, e.g., id.* at 728-29 (Section 4 motion to compel brought together with a Section 3 motion to stay was "embedded" and therefore not final and appealable under Section 1291); *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155, 157-58 (6th Cir. 1983) (district court's order granting Section 4 motion to compel arbitration and Section 3 motion to stay litigation was final and appealable under Section 1291); *Standard Chlorine of Delaware, Inc. v. Leonard*, 384 F.2d 304, 308 (2d Cir. 1967) (orders compelling arbitration "in the course of a continuing suit" not appealable); *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1344 n.1 (11th Cir. 1982) (denial of Section 4 motion to compel in ongoing case appealable). The confusion regarding this variety of approaches developed by the courts was exacerbated by the application of the *Enelow-Ettelson* doctrine, which relied upon the historic distinction between law and equity to determine the appealability of stays issued in connection with arbitration. *Olson v. Paine, Weber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734-42 (7th Cir. 1986) (extensively discussing

the history of the *Enelow-Ettelson* doctrine and its illogical results).[8]

But that debate, and the confusion that it fostered, largely was resolved by enactment of Sections 16(a)(1)(A), (a)(1)(B), (b)(1) and (b)(2) of the FAA. 9 U.S.C. § 16(a)(1)(A), (a)(1)(B), (b)(1), (b)(2). These subsections set forth specific rules governing appeals from orders refusing a stay and denying a motion to compel and prohibiting appeals from interlocutory orders granting stays or compelling arbitration. *See infra* Part I.B. Accordingly, the debate over whether orders granting and denying stays and motions to compel arbitration were appealable, which preceded enactment of these subsections of Section 16, will inform the subsequent interpretations of these subsections. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (where " 'Congress includes particular language on one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

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8. The *Enelow-Ettelson* doctrine provided that the grant or denial of a stay might be treated as a ruling on injunctive relief and, therefore, be immediately appealable under 28 U.S.C. § 1292(a)(1) where the underlying action historically sounded in law but the defense or counterclaim asserted as the basis for the stay was equitable in nature. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 281 (1988). Ironically, the same grant or denial of a stay which would be found appealable under Section 1292(a)(1), pursuant to the *Enelow-Ettelson* doctrine, would be unappealable under Section 1291. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 179, 184-85 (1955) (commenting that an order denying a stay would be unappealable under Section 1291, but that it would be appealable under Section 1292 if the underlying action was at law); *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 451-2 (1935) (finding an order denying a stay unappealable under the final judgment rule, but appealable as a denial of an injunction because the stay was based upon an equitable defense in an action at law). In 1988, this Court wisely repudiated the *Enelow-Ettelson* doctrine and the arcane rules governing appeals that it spawned. *Gulfstream*, 485 U.S. at 282-83.

Green Tree's claim that this debate also informed the enactment of Section 16(a)(3) and the meaning of "final decision" in that section, however, is misplaced. The judicial debate that preceded enactment of the new rules for appeals set forth in Sections 16(a)(1)(A), (a)(1)(B), (b)(1) and (b)(2) did not resolve the issue of when appeals could be taken from final decisions under Section 16(a)(3), since those subsections addressing appeals from orders pursuant to Sections 3 and 4 of the FAA, provide bases for appeal largely separate from Section 16(a)(3). The context of that earlier distinction is of no consequence here, where finality is determined when the district court has disposed of all issues before it. *See* Fed. R. Civ. P. 41(b), Involuntary Dismissals (stating that after a dismissal, the district court does not retain jurisdiction). Were the standards governing appeals from these different sections conflated, as Green Tree has urged, it would eviscerate the clearly separate grounds for appeal set forth in Section 16(a)(3). Therefore, the meaning of "final decision" in Section 16(a)(3) must be informed by the well-established, clearly articulated standards governing finality in 28 U.S.C. § 1291. *See Lee*, 786 F.2d at 956 (final decision is one "which effectively sends a party out of court"); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (Section 16(a)(3) retains the prior definition allowing appeals from final decisions affecting arbitration); *Napleton*, 138 F.3d at 1216-17 (Wood, J., dissenting) (plain language of term final decision in Section 16(a)(3) is a legal term of art and "decisions under § 1291 distinguishing between something that resolves all claims of all parties, and other dispositions, are too legion to cite").

This standard of finality has the additional virtue here of permitting the courts of appeals to focus on the effect of the district courts' rulings, not the labels attached to the decisions, in determining whether appeals may be taken. Rather than dwelling on whether a district court called its order a stay or dismissal, the simple standard used to determine "final decision" in 28 U.S.C. § 1291 focuses instead on the effect of the ruling.

*See Lee*, 786 F.2d at 955 (stating that court should "focus on the effect of the ruling rather than the label placed on it").

Ironically, Green Tree cites the same principle in challenging the appealability of the district court's order dismissing Ms. Randolph's claims with prejudice. Pet. Br. 24. In a reprise of its earlier argument seeking to commingle Sections 16(a)(1)(A), (a)(1)(B), (b)(1) and (b)(2) with Section 16(a)(3), Green Tree contends that the standards for appeal from a dismissal are no different from orders granting or denying a stay. Pet Br. 23-25. Therefore, Green Tree reasons from this faulty premise, appealability would turn on "an otherwise substanceless distinction between stays and dismissal." *See* Pet. Br. 24 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 n.8 (1983)). Appeals from orders granting or denying stays, however, are governed by standards that derive from vastly different sources than the standard governing appeals from "final decisions" in Section 16(a)(3). *See infra* Part I.B. Therefore, stays and dismissals are governed by very different rules in Section 16 regarding their susceptibility to appeal. To claim that there is no difference between these actions taken by the district courts is to ignore the actions themselves, and also the history and the structure of the subsections that govern appeals from them.

Green Tree is also mistaken in relying upon *Moses H. Cone* for this proposition. Far from supporting Green Tree's "substanceless distinction" argument, *Moses H. Cone* actually undermines it. In *Moses H. Cone,* the petitioner filed a suit in state court seeking a declaratory judgment that the case was exempt from arbitration. *Moses H. Cone*, 460 U.S. at 7. After the respondent sought to compel arbitration in federal court, the district court issued a stay because both cases dealt with the same issue of arbitrability of the underlying claims. *Id.* at 10. Examining the effect of the district court's action, rather than dwelling on what it was called, this Court determined that the stay constituted a "final decision" that was subject to appeal under Section 1291. *Id.* at 9-11. Although the order issued by

the district court was labeled a stay, this Court affirmed the jurisdiction of the court of appeals to hear the appeal because the order forced the defendant "effectively out of court." *Id.* at 10. In recognizing the effect of the order, this Court concluded that: "We foresee no great difficulty in determining when a district court has surrendered jurisdiction over a federal lawsuit." *Id.* at 10 n.11.

Admittedly, the holding of *Moses H. Cone* is narrow, providing "only that a stay order is final when the sole purpose and effect is precisely to surrender jurisdiction of a federal suit to a state court." *Id.* But the rationale behind the *Moses H. Cone* decision, that the effect of the ruling should govern its appealability, supports the Eleventh Circuit's decision to focus on the effect of the order dismissing the action below in concluding that the order was an appealable final decision. *See also Sullivan v. Finkelstein*, 496 U.S. 617, 627-28 & n.7 (1990) (district court order invalidating regulations of the Secretary of Health and Human Services had the effect of, and thus was, a final order susceptible of immediate review, even though district court did not caption it a final judgment); *Liberty Mutual Insur. Co. v. Wetzel*, 424 U.S. 737, 742 , 744 (1976) (district court order leaving issues unresolved was not final order, despite label to the contrary, because effect of order was not final); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976) (appealability of an order depends on its effect).

Nor is Green Tree's challenge to the appeal from the dismissal of Ms. Randolph's case consistent with its recognition that appeals are immediately available under Section 16(a)(3) from orders granting motions to compel in independent proceedings. *See* Pet. Br. 25. Green Tree concedes, as it must, that orders compelling arbitration, pursuant to Section 4 of the FAA, are appealable as final decisions when they are issued in independent proceedings. *Id*; *see also Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) ("[A]n order involving an independent claim is always final."); *Stedor*

*Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991). Notwithstanding that these orders compel arbitration, Green Tree properly recognizes that they are immediately appealable because the ruling has disposed of the entire matter before the district court. Pet. Br. 25.

There is no material difference, however, between appeals from orders compelling arbitration in independent proceedings and the appeal at issue here, which was taken from an order referring Ms. Randolph's statutory claims to arbitration and dismissing her case because the ruling had disposed of the entire matter before the district court. In both circumstances, the rulings on appeal were issued in deference to arbitration and they disposed of the entire matter before the court. The only difference is that in independent proceedings there are no underlying statutory claims at issue, while in Ms. Randolph's case her statutory claims were pending at the time that the district court compelled arbitration. The effect of the rulings in each case, however, is the same: to refer the statutory claims to arbitration and leave nothing further for the court to rule upon. Any distinction over the appealability of these orders turns on the labels given them, not their substance.[9] It makes all the more sense, therefore, to treat orders that dispose of all issues before the district court as final.[10]

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9. Green Tree also conjures up the grim prospect that appeals from embedded proceedings, even those where the district court referred all statutory claims to arbitration, will proceed piecemeal. *See* Pet. Br. at 26-27. Orders that dismiss actions with prejudice in embedded proceedings, however, will not lead to piecemeal appeals since no pieces of the litigation will remain behind.

10. As the Eighth Circuit has warned, the logic of Green Tree's position could lead to absurd results. *See Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994). If appeals remain available from orders issued in independent proceedings, but are denied from orders dismissing with prejudice the entire action in an embedded proceeding, this scheme will promote races to the courthouse to control the form of the proceeding. "If a party anticipates that an opponent will

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### B. The Structure Of Section 16 Confirms That The Dismissal With Prejudice Of Ms. Randolph's Claim Was Immediately Appealable.

The structure of Section 16 reflects an intention by Congress to permit the appeal taken from the dismissal of Ms. Randolph's case. While other subsections of Section 16 were enacted expressly to limit appeals from orders favoring arbitration, Congress imposed no such limitations on appeals taken pursuant to Section 16(a)(3). Green Tree's assertions to the contrary are mistaken. Pet. Br. at 19.

Congress enacted Section 16 in an effort to bring some order to the jurisprudence governing appeals from orders regarding arbitrations governed by the FAA. *See Napleton*, 138 F.2d at 1217 (Wood, J., dissenting) (explaining that "Section 16 was enacted . . . in order to furnish a clear rule for appealability of orders relating to arbitration proceedings."); 15B Wright *et al.*, *supra* § 3914.17, at 7. In the hope of avoiding misunderstanding, Congress set forth specifically whether appeals could be taken from orders granting and denying stays and motions to compel arbitration, addressing each scenario in a separate subsection. Thus, Section 16(a)(1)(A) expressly provides for an appeal from an order "refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A). Likewise, Section 16(a)(1)(B) allows an appeal from an order "denying a petition under section 4 of this title to order arbitration to proceed." *Id.* at § 16(a)(1)(B). In contrast, Section 16(b)(1) ordinarily precludes appeals from interlocutory orders "granting a stay of any action under section 3 of this title." *Id.* at § 16(b)(1). Similarly, Section 16(b)(2) forecloses

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move to compel arbitration [within an embedded proceeding], and that party wishes to have quick appellate review of that decision, it need simply bring an independent action to resolve that question." *Id.* at 96. This is hardly the way our system of laws should work.

appeals from interlocutory orders "directing arbitration to proceed under section 4 of this title." *Id.* at § 16(b)(2).[11]

In still other subsections of Section 16, Congress provided specifically for appeals from orders issued after district courts reviewed arbitration awards. Therefore, Section 16(a)(1)(D) allows appeals from orders "confirming or denying confirmation of an award or partial award." 9 U.S.C. § 16(a)(1)(D). Similarly, Section 16(a)(1)(E) permits appeals from orders "modifying, correcting, or vacating an award." *Id.* at § 16(a)(1)(E).

By enacting Section 16(a)(3), Congress plainly contemplated appeals under circumstances other than those addressed specifically by the subsections set forth above. Despite Green Tree's argument that every subsection of Section 16 should be read with a pro-arbitration tilt, Pet. Br. 27, neither the statutory language nor the legislative history, *see infra* Part I.C., indicate that appellate jurisdiction for all appeals from orders compelling arbitration should be denied.[12] Where the drafters wanted to ensure arbitration came before an appeal, they said so explicitly in the other subsections. If Section

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11. The order compelling arbitration below, moreover, is not subject to Section 16(b)(2) because it is not interlocutory. Interlocutory orders fail to dispose of an entire action, leaving some matters to be adjudicated by the district court. *See, e.g., Merle's, Inc. v. C.C. Synoground*, 481 F.2d 1016, 1018 (9th Cir. 1973). By referring all of Ms. Randolph's claims to arbitration, the district court disposed of the entire case. As discussed more fully below, the possibility that the parties might later seek post-arbitration relief does not transform the order into an interlocutory one.

12. Having recognized that appeals may be taken from orders compelling arbitration in independent proceedings, Green Tree cannot fairly argue, as it has, that the FAA policy favoring enforcement of arbitration agreements precludes appeals from orders compelling arbitration under Section 16(a)(3). Pet. Br. 22-23, 25, 27. The availability of appeals from orders compelling arbitration in independent proceedings demonstrates that Green Tree's repeated invocation of a "pro-arbitration meaning" to challenge the appeal below is too simplistic. *See, e.g.*, Pet. Br. 22-23, 27.

16(a)(3) were intended to be a regurgitation of the other sections, as Green Tree argues, Pet. Br. at 27, Congress would not have used the term "final decision," a term imbued with decades of meaning. *See Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 568, n.27 (1990) (stating that courts "have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten").

Nor can the possibility that, after arbitration has concluded, parties may apply for post-arbitration relief, vitiate the finality of a dismissal with prejudice, as Green Tree has argued. Pet. Br. at 25-26. First, Section 9 provides that confirmation of an award must be made by application to a court and Section 10 provides for a similar mechanism to vacate an arbitration award. 9 U.S.C. §§ 9, 10. The statutory scheme, however, makes clear that availability of such post-arbitration relief did not alter the finality of dismissal with prejudice below. Since Section 16 separately provides for appeals from orders granting or denying post-arbitration relief, Congress could not have intended to preclude appeals from a dismissal with prejudice pursuant to Section 16(a)(3) simply because post-arbitration relief might later be sought by either party.[13] Holding otherwise would render Section 16(a)(3) superfluous. *See Mackey v. Lanier*, 486 U.S. 825, 836 (1988) (explaining that this Court is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

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13. Similarly, Green Tree cites *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 (2d Cir. 1961), for the proposition that an "arbitration cannot produce an enforceable result without further judicial action" and extrapolates, therefore, that a district court's dismissal with prejudice in favor of an arbitration cannot be a final decision because of a later confirmation of the award. However, the petitioners overstate *Lummus*. Not only was *Lummus* not discussing final decisions in this context, but *Lummus* was written before Section 16 was enacted, before, therefore, the enactment of separate provisions allowing appeals after confirmation, modification, or vacation of an award. *See, e.g.*, 9 U.S.C. § 16(a)(1)(D)-(E).

Second, the confirmation of an arbitration award is simply akin to the execution of a judgment in a judicial forum. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (" '[C]onfirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.' ") (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)); *Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642 (6th Cir. 1987) ("[A]n action to confirm the award should be a summary proceeding, not a proceeding in which the defendant seeks affirmative relief."). Thus the prospect that the statutory claims referred to arbitration might later be subject to judicial confirmation does not vitiate the finality of the order dismissing the underlying action with prejudice. *See Coopers*, 437 U.S. at 467 (final decision "'ends the litigation on the merits and *leaves nothing for the court to do but execute the judgment*'") (quoting *Catlin*, 324 U.S. at 233) (emphasis added).

Third, the permissive nature of the post-arbitration relief authorized by Sections 9 and 10 and the venue in which that relief may be obtained, underscores the likelihood that Congress had no intention of requiring the district court below to retain jurisdiction after referring all claims to arbitration. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1339 (2000). Otherwise, district courts would be required to retain jurisdiction on the chance that a party might seek post-arbitration relief and choose that venue in which to pursue it. Surely the finality of the district court's order dismissing Ms. Randolph's case with prejudice cannot be affected by such an uncertain course of events.

Nor may Section 3 of the FAA properly be read to preclude a district court that referred all claims before it to arbitration, from issuing an order dismissing the case that is final and appealable. *See* 9 U.S.C. § 3. Nothing in the language of the section nor the structure of the FAA contemplates such an extraordinary result. Section 3 requires a district court to stay

the trial of an underlying action until the conclusion of arbitration, upon application by a party and satisfaction that the issue stayed may be referred to arbitration. *Id.* Nothing in Section 3, however, forecloses the dismissal of the action where all the underlying claims have been referred to arbitration. Nor is there any indication that Congress intended Section 3 to suspend application of the ordinary rules of finality where the district court would otherwise be authorized to dismiss the action before it with prejudice. As the overwhelming majority of courts considering this issue have concluded, Section 3 simply requires the issuance of a stay where one or more, but not all, issues before the court are arbitrable. Where all issues before a court are referable to arbitration, however, the district court should dismiss the action. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (" '[W]e do not believe the proper course is to stay the action pending arbitration. Given our ruling that all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose.' . . . [T]he district court acted within its discretion when it dismissed this case with prejudice.") (quoting *Sea-Land Serv. Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)); *Hensel v. Cargill, Inc.*, 198 F.3d 245, 1999 WL 993775 at *4 (6th Cir. 1999) ("Under § 3 of the FAA, if any separate claim is referable to arbitration, then a stay of proceedings on the remaining claims is mandatory. However, litigation in which all claims are referred to arbitration may be dismissed."); *Bercovitch v. Baldwin School*, 133 F.3d 141, 156 (1st Cir. 1998) (dismissal, rather than stay, is proper where all issues are arbitrable); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) (stating that if all claims involved in an action are arbitrable, a court may dismiss the action instead of staying it); *Sparling*, 864 F.2d at 638 (Section 3 does not preclude dismissal). "Since there are no live controversies before this court, the appropriate procedure is dismissal of the action." *Sea-Land Serv.*, 636 F. Supp. at 757-58 (citing *Moses H. Cone*, 460 U.S. at 13).

### C. The Legislative History Of Section 16(a)(3) Confirms That The District Court's Dismissal Of The Action Was A Final, Appealable Decision.

The legislative history of Section 16(a)(3) strongly confirms that the Eleventh Circuit was correct in treating the dismissal with prejudice of Ms. Randolph's action as an appealable order. Indeed, this history may be dispositive of the issue. *See Arnold*, 920 F.2d at 1274-75.

Upon the suggestion of the Judicial Conference of the United States, Congress enacted what is now Section 16 to clarify the rules of appellate review of decisions regarding arbitration.[14] In 1986, the ABA proposed H.R. 4975 to amend Title 9 of the United States Code. Although the bill died in committee, the Judicial Conference "unanimously approved the proposed legislation at its 1986 annual meeting." Letter from Edgar H. Brenner, Chairman of the ABA Arbitration Committee to Rep. Kastenmeier at 3 (Mar. 6, 1987); *see also Report of the Proceedings of the Judicial Conference of the United States*, 59-60 (Sept. 18-19, 1986) (reporting that the Judicial Conference voted to support the legislation).

The Judicial Conference adopted Section 16 as its own, and incorporated it into its proposed omnibus bill to reform the judiciary. *See* Judicial Branch Improvements Act of 1987, S. 1482, 100th Cong, introduced as § 616 (1988). In March 1987, at the request of the Judicial Conference of the United States, Senator Heflin introduced S. 1482. 134 Cong. Rec. 31,039, 31,050 (1988) (statement of Sen. Heflin). Section 616 of S. 1482 amended Title 9, and contained the text of today's Section 16 of the FAA.

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14. In 1988, Congress enacted an addendum to the FAA, which contained provisions that controlled the appealability of district court decisions relating to arbitration. These were initially codified in Section 15 of the FAA. In 1990, these jurisdictional provisions were renumbered and moved to Section 16. *See generally Perera v. Siegel Trading Co.*, 952 F.2d 780, 782 (7th Cir. 1992).

In March, April and May 1988, the Subcommittee of the Senate Judiciary Committee on Courts and Administrative Practice held hearings on S. 1482. 134 Cong. Rec. at 31,050. On March 14, 1988, Judge Elmo B. Hunter and Judge Richard M. Bilby testified on behalf of the Judicial Conference on S. 1482 and submitted a written section by section analysis on behalf of the Judicial Conference to accompany their testimony, which clearly enunciated the intent and purpose of Section 16(a)(3).

The prepared statement of the Judicial Conference of the United States, submitted to the Judiciary Committee during hearings on the proposed amendments to the FAA, explains the intent of Section 16(a)(3):

> [U]nder the proposed statute, *appealability does not turn solely on the policy favoring arbitration.* Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, or *a final judgment dismissing an action in deference to arbitration.* These appeals preserve the general policy that appeals should be made available *where there is nothing left to be done in the district court.*

*Judicial Branch Improvements Act of 1987, Hearings on S. 1482 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 100th Cong. 85-86. (1988) (statement of Judge Elmo B. Hunter and Judge Richard M. Bilby on behalf of the Judicial Conference of the United States) (emphasis added). Thereafter, the Senate adopted this precise language as the legislative history of Section 16(a)(3). *See* 134 Cong. Rec. at 31,065 (1988) (Section by Section Analysis, incorporating, in whole, quoted statement of Judicial Conference regarding Section 16(a)(3)). Ultimately, the legislation proposed by the Judicial Conference was enacted into law and codified at Section

16(a)(3). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Title X, § 1019(a), 102 Stat. 4671 (1988); *see also Arnold*, 920 F.2d at 1274 (stating that Section 15 of the FAA, later renumbered Section 16, was enacted by Congress, acting upon the 1986 recommendations of the Judicial Conference in order to clarify appealability standards).

This highly relevant legislative history informed the Eleventh Circuit's interpretation of Section 16(a)(3) as it should here. Other parts of Section 16, for example, which allow appeals from orders refusing a stay of an action or denying a motion to compel arbitration, *see* § 16(a)(1)(A)-(B), reflect a decided policy favoring the enforcement of arbitration agreements; in contrast, the legislative history reveals that enactment of Section 16(a)(3) was not animated by the same sentiment.

Instead, Section 16(a)(3) was intended to permit appeals from "a final judgment dismissing an action in deference to arbitration." 134 Cong. Rec. at 31,065. Echoing the standard articulated for appeals under 28 U.S.C. § 1291, this history confirms that appeals may be taken "where there is nothing left to be done in the district court." *See Arnold*, 920 F.2d at 1275. Unlike the other parts of Section 16, this subsection does not distinguish between appeals from decisions favoring arbitral and judicial forums. *See, e.g., John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136 (3rd Cir. 1998) (when decision is final, it does not matter whether holding favors arbitration or litigation); *Arnold*, 920 F.2d at 1275 (Section 16 retains its prior meaning "allowing appeals from final decisions whether or not they direct or refuse to direct arbitrations"); *Stedor*, 947 F.2d at 731 ("Section 16(a)(3) . . . applies equally whether the district court order favors litigation or arbitration" and the legislative history "confirms that Congress intended to adopt the traditional definition of final"); *Perera*, 951 F.2d at 783 ("[A]s for decisions favoring arbitration . . . final decisions granting arbitrations are appealable.").

Accordingly, the Eleventh Circuit correctly held that the district court's order dismissing the case before it in deference to arbitration was an appealable, final order under Section 16(a)(3) of the FAA, and that such dismissals do give rise to final orders.

## II. THE ELEVENTH CIRCUIT PROPERLY HELD UNENFORCEABLE AN ARBITRATION AGREEMENT WHICH COMPROMISED — IF NOT EVISCERATED — MS. RANDOLPH'S ABILITY TO ENFORCE HER STATUTORY RIGHTS UNDER TILA.

There is no dispute that the FAA reflects a policy favoring enforcement of freely negotiated agreements to arbitrate. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Nothing in the Eleventh Circuit's ruling undermines that policy.

Notwithstanding the regard that must be given to the federal policy favoring arbitration, however, there is an equally compelling federal policy that cautions against the enforcement of arbitration agreements which impair the exercise of underlying statutory rights. The enforcement schemes created by Congress when it enacted TILA and ECOA would be greatly compromised if claims arising under those statutes were submitted to an arbitral forum in which plaintiffs would bear costs substantially greater than those borne in a judicial forum and would relinquish their ability to join collectively to prosecute their statutory rights. Recognizing Green Tree's arbitration agreement failed to protect against the imposition of prohibitive costs on plaintiffs with claims under TILA and ECOA, the Eleventh Circuit properly barred enforcement of the agreement as it was drafted.

Similarly, the district court interpreted the arbitration agreement's terms, drafted by Green Tree, to bar Ms.

Randolph from prosecuting her TILA and ECOA claims through a class action, as she had sought to do in the court. Although the Eleventh Circuit failed to reach the question of whether an arbitration agreement may be enforced which, by foreclosing class actions under TILA, impairs that statute's enforcement scheme, it has been properly raised before this Court as an alternative basis to affirm the circuit court's decision declining enforcement of the agreement as it was drafted.

Where the terms of an arbitration agreement impede the enforcement of a party's underlying statutory rights, the enforcement of the agreement would work a "prospective waiver of a party's right to pursue statutory remedies. . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). In those circumstances, this Court should have no "hesitation in condemning the agreement as against public policy." *Mitsubishi Motors*, 473 U.S. at 637 n.19. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[T]here can be no prospective waiver of an employee's rights under Title VII."). Green Tree's arbitration agreement effectively bars Ms. Randolph and members of the putative class from vindicating their statutory rights. The agreement forces them to risk paying potentially large arbitration costs and prohibits the use of the class action mechanism, a device Congress clearly contemplated as essential to the effective private enforcement of TILA. Exposed to the risk of high costs and deprived of the chance to proceed collectively, Ms. Randolph and the class she sought to represent would be deterred from exercising their rights under TILA and ECOA. Enforcement of Green Tree's arbitration agreement thus would effectuate a "prospective waiver" of their rights under TILA and ECOA. The Court should have no hesitation, therefore, in "condemning the agreement as against public policy." *Mitsubishi Motors*, 473 U.S. at 637 n.19.

### A. The Arbitration Agreement Was Unenforceable Because It Failed To Ensure That The Costs Ms. Randolph Would Bear In Arbitration Were No Greater Than Those That Would Be Borne In Court.

The Eleventh Circuit correctly held Green Tree's arbitration agreement unenforceable because it failed to protect against exposing Ms. Randolph and other consumers with claims of limited monetary value to exorbitant arbitration costs which would discourage them from exercising their rights under TILA and ECOA. There is no comparable risk of exposure to high and unknown costs for litigants who proceed in the courts. The federal policy favoring the enforcement of arbitration agreements is predicated on the assumption that the statutory rights accorded to the parties will not be diminished by the choice of the forum in which they are exercised. *See Mitsubishi Motors*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). Because Green Tree's arbitration agreement created the risk that Ms. Randolph and the putative class members would bear costs that exceeded those borne in the courts, arbitration was no longer just "another forum." *Mitsubishi Motors*, 473 U.S. at 628. It became a forum in which the costs would not only discourage Ms. Randolph and others from proceeding to exercise their statutory rights, but would in fact preclude them from doing so. As such, the agreement is not enforceable.

### 1. The Imposition Of Excessive Arbitration Costs And Fees Will Discourage Parties From Exercising Their Statutory Rights.

Costs are virtually unique in their power to discourage parties from exercising their rights. Not surprisingly, therefore, courts have declined to enforce arbitration agreements where they impose costs that would so freight the exercise of statutory rights as to risk, or cause, the waiver of those rights.[15] In *Shankle v. B-G Maintenance of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999), for example, the Tenth Circuit struck down an arbitration agreement that required an employee to be responsible for half of the arbitrator's fees — an amount estimated between $1,875 and $5,000. *Id.* at 1234-35. The court concluded that the agreement placed the employee "between the proverbial rock and a hard place — it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." *Id.* at 1235. Similarly, in *Pitchford v. Oakwood Mobile Homes, Inc.*, the Court found an otherwise valid arbitration agreement unenforceable because its fee schedule dissuaded a plaintiff of limited means from proceeding in the arbitral forum. *Pitchford*, No. 5:99CV00053, 1999 U.S. Dist. LEXIS 20596, at *26-30 (W.D. Va. Dec. 20, 1999). Confronted with an agreement that required the plaintiff to share arbitrator fees in excess of a thousand dollars, the court held that the fees "present[ed] an insurmountable economic barrier for vindicating plaintiff's claims in the arbitrable forum." *Id.* at *29-30; *see also Hornstein v. Mortgage Mkt., Inc.*, Civ. No. 98-1104-AA, 1999 U.S. Dist. LEXIS 21463, at *3, 9 (D. Or.

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15. Individuals against whom arbitration agreements are enforced should bear those costs for which they could reasonably have expected to be responsible in a judicial forum. Costs which exceed that level jeopardize the status of arbitrations as a forum comparable to the courts. *See Gilmer*, 500 U.S. at 26; *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

Jan. 7, 1999) (holding unenforceable arbitration agreement that required parties to split arbitration costs and concluding that agreement "unabashedly violates the letter and spirit of the FLSA" and state law "by denying the basic right of participation in the adjudicatory process."); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255 (S.D.N.Y. 1998) (arbitration agreement unenforceable where there was the potential that it would impose financial burdens on the plaintiff's access to the arbitral forum, "surely deter[ing] the bringing of arbitration" and running counter to the underlying purpose of Title VII) (quotation omitted);[16] *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 571, 574 (N.Y. App. 1998) (minimum, non-refundable filing fee of $500 and potential for additional $1,000 in arbitration costs led court to conclude "excessive cost factor" in arbitration agreement was "unreasonable and surely serves to deter the individual consumer form invoking the process. . . . Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute."); *Meyers v. Terminix Int'l Co.*, 697 N.E.2d 277, 280-81 (Ohio Ct. App. 1998) (holding arbitration agreement unenforceable where homeowner was unaware of non-refundable $2,000 filing fee and such fee "would prevent a consumer of limited resources from having an impartial third party review his or her complaint").[17] Notwithstanding

16. *See also Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (where employer did not "promise" to pay for arbitrator's time, leaving employee with potential liability for "at least half the hefty cost of an arbitration" in addition to "steep [AAA] filing fees[,]" employer's arbitration agreement was contrary to the statutory policy of Title VII and thus unenforceable).

17. *See also Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (holding unenforceable a (Cont'd)

its silence on the amount and allocation of arbitration costs, Green Tree's agreement is nonetheless infirm because it creates the risk that Ms. Randolph and others would bear substantial costs, discouraging them from pursuing their statutory rights altogether.

### 2. The Record Below And Other Sources Demonstrate That, By Proceeding To Arbitration, Ms. Randolph Risked Exposure To Substantial Costs Associated With Arbitration.

In this case, like others, the costs and fees associated with arbitration may be substantial. Ms. Randolph presented evidence below of the potentially high costs associated with arbitration and her concerns that such costs would preclude her from pursuing her statutory claims.[18] Here, Ms. Randolph made the best record possible of the costs of arbitration to which Green Tree's arbitration agreement might expose her. In the district court, Ms. Randolph quoted a survey conducted by the American Arbitration Association which concluded that arbitrator fees alone are about $700 per day. *See* J.A. 13 (Mot. for Reconsid. at 8-9, Docket No. 53). She also offered

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(Cont'd)
fee-splitting provision in arbitration agreement on basis that "the prohibitive cost substantially limits the use of the arbitral forum"); *Matter of Arbitration Between Teleserve Systems, Inc. and MCI Telecommunications Corp.*, 659 N.Y.S.2d 659, 664 (N.Y. App. 1997) (holding unenforceable arbitration clause mandating $4,000 plus .5% flat filing fee, or $204,000, as "patently excessive," and concluding "[t]he practical effect of such an oppressive and burdensome fee is to bar arbitration of petitioner's claims").

18. Arbitration here would not necessarily have been less expensive than proceeding in court. Had Ms. Randolph been permitted to proceed in court individually, rather than compelled to pursue arbitration, she could have prosecuted her claim in the small claims court for Bullock County, Alabama where she resides. The filing fee there is $57.

data that the typical filing fee for claims below $10,000 is $500. *Id.*

It is not surprising that Ms. Randolph was unable to present additional evidence of the actual costs of arbitration that she would have confronted. As the Eleventh Circuit concluded, Green Tree apparently entrusted broad discretion to its arbitrators, leaving the amount and allocation of costs to their discretion. Pet. App. 17a-18a.

Evidence from other sources, however, confirms that arbitration costs could be prohibitive, certainly dwarfing the $15 value of Ms. Randolph's actual damages. *See Cole*, 105 F.3d at 1480-81 n.8 ("arbitrators' fees are commonly $500 to $1,000 or more per day"); *Shankle,* 163 F.3d at 1235 (arbitrator's fees estimated at "between $1875 and $5000"); *Paladino*, 134 F.3d at 1062 (filing fee of $2,000). Other costs associated with arbitration, such as fees for telephonic and in-person hearings, room rentals, court reporters and transportation could boost the costs of arbitration to levels that are even more unaffordable. *See, e.g., Jones*, 81 F. Supp. 2d at 693 (average arbitration would cost $1,875 to $7,000 for arbitrator's fee, court reporter's fee, transcripts and facility charges). Ms. Randolph made a record of the possible costs sufficient to contend that they were prohibitive.

### 3. Green Tree's Arbitration Agreement Created A Risk That Ms. Randolph Would Bear Prohibitive Costs.

Notwithstanding that Green Tree's arbitration agreement was silent as to the amount and allocation of costs, it nonetheless posed a very real risk that Ms. Randolph would have borne prohibitive costs had she proceeded to commence the arbitration to which the district court ordered her. The failure to specify the amount and allocation of arbitration costs, therefore, created the same deterrent to exercise statutory rights that has been condemned by courts reviewing large costs specified in agreements.

Green Tree's approach to the litigation below reinforced Ms. Randolph's fears that she would bear substantial costs if she proceeded to arbitration. After the litigation began and Ms. Randolph asserted that the costs of arbitration would be prohibitive, Green Tree never offered to delineate the amount, or range, of costs that could be expected in arbitration. *See* Pet. App. 17a-18a. As the Eleventh Circuit found, Green Tree was not even able, or refused, to specify the rules that it expected would govern the arbitration process. *Id.* The court of appeals properly construed Green Tree's silence in its arbitration agreement as an unwillingness to bear such costs, Pet. App. 17a-18a, and Ms. Randolph's fears of incurring the costs were well-founded.

Nor could Ms. Randolph reasonably have been expected to commence the arbitration in order to ask the arbitrator assigned to the proceeding about the costs of arbitration. At that point, she would have already incurred costs of going forward. The price of inquiring about the costs of arbitration cannot be to incur the costs themselves.[19]

Confronted with another arbitration agreement which failed to specify the amount or the allocation of costs, the Court of Appeals for the District of Columbia Circuit expressed such great concern over the risk that the uncertainty would chill the exercise of the underlying statutory rights that it interpreted the agreement to specify the cost allocation.

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19. Although the FAA provides for an opportunity to obtain modification of an award on grounds that might include a challenge to the costs as excessive, *see* 9 U.S.C. § 11, the failure of the agreement here to establish standards for the allocation of costs makes the outcome of that process hard to predict. Ms. Randolph would have to risk incurring the costs of arbitration before she could seek judicial review and without any standard by which to assess the likelihood of prevailing in the review. Such a procedure hardly provides adequate protection against the imposition of prohibitive costs, leaving a prudent individual understandably hesitant about exercising statutory rights in arbitration.

*Cole*, 105 F.3d at 1477-81, 1483-86. Like Ms. Randolph, the plaintiff in *Cole* was required to execute an arbitration agreement that failed to provide for an allocation of the arbitration costs. *Id.* at 1480-81. Relying upon *Mitsubishi Motors*, 473 U.S. at 628 and *Gilmer*, 500 U.S. at 26, D.C. Circuit concluded that plaintiffs should no more pay the fees of an arbitrator than they should compensate the judges before whom they appear. *Cole*, 105 F.3d at 1482. To conclude otherwise, would impair access to the arbitration, creating the risk of a prospective waiver of statutory rights that would jeopardize the arbitration agreement altogether. *Id.*

Notwithstanding the risk that Ms. Randolph would bear these costs, the district court here simply enforced the unclear agreement. Pet. App. 4a-5a, 48a-50a, 53a-54a. Other courts have declined to enforce ambiguous or unclear arbitration agreements or terms, concluding that these deficiencies should be construed against the drafter. *See Mastrobuono*, 514 U.S. at 62-63 ("Respondents drafted an ambiguous [arbitration] document, and they cannot now claim the benefit of the doubt."); *see also Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17-19 (1st Cir. 1999); *Paladino*, 134 F.3d at 1059-60. The same should have occurred here.[20]

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20. Of course, the FAA grants district courts the authority to determine whether defects in arbitration agreements preclude their enforcement. *See* 9 U.S.C. § 3, 4. Even where agreements suffer from a fatal flaw, such as afflicted Green Tree's agreement, the district courts may condition enforcement of agreements on their reformation to bring them into conformity with the underlying statutory provisions. *See generally Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986).

### 4. The Fee Shifting Provisions Of TILA And ECOA Do Not Save Green Tree's Arbitration Agreement.

In an effort to salvage its arbitration agreement, Green Tree asserts that its agreement specifies the allocation of costs because it provides the arbitrator with the power to award all remedies available under the applicable laws.[21] Pet. Br. at 37-38. While TILA and ECOA each have fee-shifting provisions,[22] which may apply by virtue of this contract provision, they fail to protect Ms. Randolph from the imposition of prohibitive costs and from the consequent impairment of statutory rights that render the agreement unenforceable.

This Court's interpretations of the taxable costs that may be shifted to a prevailing plaintiff, pursuant to 28 U.S.C. § 1920, would not include arbitration costs. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), this Court held that federal courts may only shift those costs to a losing party where they are specified in 28 U.S.C. § 1920. *Id.* at 440. In *Crawford*, the prevailing plaintiff in a Title VII case sought reimbursement of expert witness fees pursuant to Fed. R. Civ. P. 54(d), which provides for the award of costs to a successful party. *Id.* at 438-42. Because expert witness fees were not one of the costs specified in Section 1920 and there was no "explicit statutory or contractual

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21. However, Green Tree's arbitration agreement only grants the arbitrator "all powers provided by the law[;]" it does not require the arbitrator to invoke them. J.A. 37. Therefore, under the arbitration agreement, the arbitrator need not follow the fee-shifting provisions of TILA and ECOA. The same is true regarding the award of statutory damages.

22. The fee-shifting provisions in TILA and ECOA are found at 15 U.S.C. § 1640(a)(3) and 15 U.S.C. § 1691e(d), respectively.

authorization for the taxation of" expert witness fees as costs in Rule 54(d) or elsewhere, this Court held that the lower court was "bound by the limitations set out in 28 U.S.C. . . . § 1920" and thus prohibited taxing expert witness fees as costs. *Id.* at 441-42, 445; *see also West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86-87 (1991) (holding that Section 1920 governed federal court's power to shift expert witness fees to losing party and that 42 U.S.C. § 1988's provision for "reasonable attorney's fee" was insufficient to repeal Section 1920).

Thus, a plaintiff who brings a successful action under TILA or ECOA may seek to recover only those costs defined by Section 1920. *See, e.g., Smith v. Chapman*, 436 F. Supp. 58, 66 (W.D. Tex. 1977) (awarding Section 1920 costs to prevailing party in TILA action); *Thomas v. First Fed. Sav. Bank of Indiana*, 659 F. Supp. 421, 424-25 (N.D. Ind. 1987) (awarding Section 1920 costs to prevailing party in ECOA action). None of the categories of expenses listed in Section 1920 can reasonably be read to cover the cost of an arbitrator's time or the additional expenses of arbitration. Nor is there any "explicit statutory or contractual authorization for the taxation" of arbitration expenses set forth in the arbitration agreement here.[23]

Moreover, even if the costs of arbitration were covered by the fee shifting provisions of TILA and ECOA, such costs would only be recoverable in the event that Ms. Randolph prevailed on her statutory claims. Thus, to vindicate her statutory rights under the agreement, Ms. Randolph would have had to be willing to risk incurring large arbitration costs and fees. This risk would greatly deter consumers from

23. Where Congress has allowed additional expenses to be shifted pursuant to Section 1920, it has expressly provided for them. For example, Congress allowed the award of expert witness fees as costs in fee shifting provisions of the Clean Air Act and the Civil Rights Act of 1991. *See, e.g.*, 42 U.S.C. §§ 7604(d), 7607(f); 42 U.S.C. § 2000e-5(k).

prosecuting their claims and would act as a prospective waiver of their substantive rights.

### B. The Arbitration Agreement Is Unenforceable Because It Prevents Ms. Randolph And Putative Class Members From Proceeding On A Class Basis, Thereby Effectively Denying A Remedy To The Entire Class.

The failure to permit Ms. Randolph to prosecute her claim as a class action constitutes an alternative ground on which to affirm the Eleventh Circuit's order barring enforcement of the arbitration agreement. Green Tree's use of arbitration clauses in its financial agreements that fail to permit class treatment of the underlying claims is a transparent attempt to immunize itself from liability. Were the arbitration agreement at issue here enforceable, Green Tree would have effectively foreclosed the pursuit of class actions under TILA, the availability of which Congress regarded to be essential to the enforcement of the statute.

#### 1. This Court Has Long Recognized The Critical Function Of The Class Action Mechanism In The Private Enforcement Of Statutory Rights Where The Value Of Individual Claims Are Limited.

Class actions play a vital role in enabling consumers with small individual claims, like Ms. Randolph and others, to prosecute their claims. This Court has stated:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor.

*Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156,

161 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . most of the plaintiffs [with small claims] would have no realistic day in court if a class action were not available."); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Thus, efforts to foreclose the availability of class actions in cases arising under TILA should prompt great skepticism.[24]

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24. The availability of fee-shifting does not lessen the importance that this Court has attached to the pursuit of consumer cases as class actions. In *Eisen*, for example, the availability of fee-shifting under the Sherman Act, 15 U.S.C. § 15a, and the Exchange Act of 1934, 15 U.S.C. § 78i(e), did not alter this Court's assessment that class treatment was essential to the pursuit of claims that may be worth no more than $70 each. *See Eisen*, 417 U.S. at 159-61.

Nor are courts likely to award lodestar fees, which may be many multiples of the $15 of economic damages that are available to Ms. Randolph and others similarly situated, because broad, injunctive relief is not likely to be awarded in these individual TILA claims against Green Tree. *See City of Riverside v. Rivera*, 477 U.S. 561, 574-76 (1986) (awarding attorneys' fees seven times the damages in a civil rights case because of the broad public importance of the non-monetary relief obtained); *Thomas v. County of Los Angeles*, 978 F. 2d 504, 510 (9th Cir. 1992) (reversing overly broad injunction because relief "should be tailored to fit within the scope of the litigation"); *Servisco v. Morreale*, 312 F. Supp. 103, 107 (E.D. La. 1970) (holding that "an injunction should conform to the requirements of the case").

### 2. Congress Attached Great Importance To The Availability Of Class Actions In The Enforcement Of The Truth In Lending Act.

Congress expected consumers to enforce TILA as "private attorneys general." *See McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978) ("The scheme of the statute is to create a system of private attorneys general to aid its enforcement. . . ."); *Johnson v. Tele Cash, Inc.*, 82 F. Supp. 2d 264, 275 (D. Del. 1999) ("[A]s countless circuit courts have noted, TILA is a prophylactic measure that creates a system of 'private attorneys general' to aid its enforcement.") (citation omitted).

Congress regarded the potential for class-wide liability as necessary to prompt lenders to comply voluntarily with the statute. By foreclosing the availability of class actions to consumers who invoke TILA, Green Tree's arbitration agreement frustrates the Congressional scheme for enforcing TILA. *See Watkins v. Simmons & Clark*, 618 F.2d 398, 402 (6th Cir. 1980); *Johnson*, 82 F. Supp. 2d at 269; *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1120 (D. Haw. 1976).

The legislative history also makes this clear. In the 1974 amendments to TILA, for example, Congress set a limit on non-economic damages that may be awarded in class actions. The cap was needed to reassure some courts, previously reluctant to certify classes under TILA out of fear that aggregate damages awardable could destroy banks, and other lenders, that they could resume certifying class actions under the statute. S. Rep. No. 93-278, at 14-15 (1973). These amendments were enacted, therefore, to remove economic deterrents to the certification of TILA class actions. *Id.* In explaining the purpose of the 1974 Amendments, the Senate Committee on Banking, Housing and Urban Affairs confirmed the importance that Congress attached to class actions in the enforcement of TILA:

> [T]he Committee agrees with the Federal Reserve Board that "potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure". . . .

*See id.* (emphasis added); *see also Watkins*, 618 F.2d at 400. The report of the Federal Reserve Board, upon which the Committee relied in its enactment of the 1974 amendments to TILA, elaborated on the reason it attached such importance to the enforcement of TILA through class actions:

> [A]ny inquiry into the justification for class actions should . . . [include] the prophylactic effect of the threat of class action exposure. That threat elevates a possible Truth in Lending lawsuit from the ineffective "nuisance" category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance.

S. Rep. 93-278, at 36-37 (1973); *see also* 1972 Board of Governors of the Fed. Reserve Sys. Ann. Rep. to Congress on Truth in Lending 13-14.[25]

In 1976, Congress again emphasized the importance of class actions to the private enforcement of TILA, by increasing the maximum cap for class action recovery from $100,000 to $500,000. In enacting the 1976 amendments, Congress explained:

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25. Green Tree's citation to TILA cases brought by individuals in an effort to dispel the importance of class actions in the TILA enforcement scheme is of no consequence. Pet. Br. at 46-47 & n.13. As the legislative history reflects, it is the potential for class-wide liability, not the number of class actions brought, which is critical to ensuring voluntary compliance with TILA by banks like Green Tree. *See supra* Part II.B.2. The fact that several TILA cases brought by individuals were before this Court, therefore, is irrelevant in assessing the importance that Congress placed on class actions in enforcing the statute.

> The setting of any ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class. *The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized.* Under the present Truth in Lending Act, where the class action ceiling is $100,000, several courts have noted the *incompatibility of that ceiling with the effective use of the class action device. The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device.*

S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 438 (hereinafter "Senate Report 94-590") (emphasis added) (citations omitted).

It is clear from the legislative history that Congress believed that the availability of class action liability was critical to securing compliance with the TILA.[26] Of course, Congress did not direct the district courts to grant class certification whenever requested by consumers. To do so would have thwarted the rigorous analysis required by Rule 23, Fed. R. Civ. P. in determining whether class certification is warranted by the facts of each case. *See General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

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26. Green Tree contends that the concurrent jurisdiction of federal and state courts to entertain TILA and ECOA claims evidences a recognition by Congress that these statutes may be enforced without the benefit of federal civil procedures like class actions. *See* Pet. Br. 34-35. Since most states have class action procedures, including Alabama, Green Tree's reasoning lacks force here. It was the availability of class actions to enforce these statutes, not the source of the class procedures, that concerned Congress. *See* Ala. St. R. Civ. P. 23.

But the intention of Congress was clear. Not once, but twice, Congress expressly stated its support for the availability of class actions to ensure the proper enforcement of TILA.[27]

### 3. By Foreclosing The Pursuit Of Class Actions Under TILA, Green Tree's Arbitration Agreement Works A Prospective Waiver Of The Rights Of Members Of The Putative Class.

By precluding Ms. Randolph and members of the putative class she represented from prosecuting their TILA claims through a class action, Green Tree has deprived them of a primary means contemplated by Congress for exercising their rights under the statute.[28] Because the members of the

27. Green Tree's blithe assertion that the temporary, six-month moratorium on class actions enacted in 1995 for a small group of TILA claims unlike those pursued by Ms. Randolph, demonstrates Congressional hostility to class actions does not withstand scrutiny. As the Chairman of the Senate Banking Committee at the time said: "This moratorium is narrowly focused on a specific, technical disclosure problems [sic], and will last only until October 1, 1995." *See* 141 Cong. Rec. S5614-02 (daily ed. Apr. 24, 1995) (statement of Sen. D'Amato); *see also id.* ("bill is narrowly drawn" and "intended as a temporary measure to deal with an urgent situation") (statements of Sen. Mack and Sen. D'Amato); *see also* 141 Cong. Rec. H4120-04 (daily ed. Apr. 4, 1995) (statement of Rep. Roukema). If anything, the temporary moratorium and following amendment illustrate that where Congress perceived a risk of abuse of the class action device, it will take prompt action, as it did by enacting the 1995 amendments. Had Congress disfavored the use of class actions to enforce TILA, as Green Tree suggests, it could have restricted the availability of class actions or the relief available from them. Leaving its earlier enactments intact reflects the continuing support of Congress for ensuring class actions are available to enforce TILA.

28. While Green Tree's arbitration agreement is silent on the issue of whether consumers may seek class wide relief through arbitration, Green Tree's strenuous opposition to class certification before the district court, *see* J.A. 13 (Br. in Supp. of Mot. to Compel Arb. at 50-55, Docket No. 50), eliminates any uncertainty that when it drafted the arbitration agreement without reference to class actions, it intended to deny the use of class actions to consumers by referring the cases individually to arbitration.

putative class have suffered modest economic damages, as the $15 value of Ms. Randolph's claim reflects, Green Tree's success in foreclosing access to class treatment would likely leave them with no other means to protect their statutory rights.[29] *See Eisen* 417 U.S. at 159-61; *Phillips Petroleum*, 472 U.S. at 809. Given the limited economic damages at issue individually, other consumers aggrieved by the mortgage agreement would be unlikely to invoke their rights under TILA, absent the ability to aggregate their claims and proceed on a class wide basis. Even the district court below seemed to recognize that, divested of the chance to prosecute their claims collectively, Ms. Randolph and the other consumers affected by Green Tree's practices were less likely to secure compliance with TILA. *See* Pet. App. 38a. By depriving Ms. Randolph and the members of the putative class she represented of the only viable means of prosecuting their claims under TILA and ECOA, arbitration is no longer "just another forum." *Mitsubishi Motors*, 473 U.S. at 628. Instead, it constitutes an impermissible bar to the ability of consumers to seek substantive remedies under TILA.[30]

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29. This action was originally brought on behalf of Ms. Randolph and other similarly situated mortgagees and the appeal was noticed as such. Therefore, the interests of the absent class members are properly before this Court.

30. Nor can there be any question that Ms. Randolph did not affirmatively waive her right to bring a class action by agreeing to arbitrate her claims. Because Green Tree's agreement was totally silent about whether Ms. Randolph could prosecute her claims collectively, she lacked any notice that she would be waiving this option. *See* Restatement (Second) of Contracts § 84 cmt. b (1981) (a waiver is a knowing relinquishment of a right about which a consumer knows or has reason to know).

### 4. This Court's Decision In *Gilmer v. Interstate/Johnson Lane Corporation* Does Not Permit Arbitration Agreements To Work A Wholesale Waiver Of Class Actions.

There is nothing in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), which endorsed the ban on class actions that Green Tree's arbitration agreement accomplished. This Court simply held that claims arising under the Age Discrimination in Employment Act ("ADEA") are susceptible to arbitration. *Id.* at 23. The plaintiff in *Gilmer* had asserted many grounds for exempting ADEA claims from arbitration. *Id.* at 30. Among them, he faulted the arbitration agreement for failing to permit him to proceed collectively on behalf of himself and others similarly situated. *Id.* at 32. Unlike this case, however, which was brought as a class action, *Gilmer* involved only an individual action.[31] *Id.* at 23. Thus, the plaintiff in *Gilmer* had relied on the mere possibility that he might expand his case to a collective action as a basis to foreclose arbitration. *Id.* at 32. Not surprisingly, this Court observed that "'if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* (quoting *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). Thus, persons with individual statutory claims may not exempt them from arbitration simply because the statute they have invoked contemplates the possibility of class treatment. The Court had no occasion, therefore, to consider whether a consumer who brought a class action, under a statute which Congress expressly contemplated be enforced

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31. In enforcing an agreement that foreclosed the ability to proceed collectively, this Court was reassured that the New York Stock Exchange rules expressly provided for collective proceedings. *See Gilmer,* 500 U.S. at 32.

through class actions, can be denied the chance to proceed on behalf of a class simply because she agreed to submit her claim to arbitration.

Moreover, *Gilmer*'s reliance on *Nicholson* confirms this interpretation of the decision. *Gilmer*, 500 U.S. at 32 (citing *Nicholson*, 877 F.2d at 241 (Becker, J., dissenting)). In *Nicholson*, a majority of the Third Circuit ruled that ADEA claims were exempt from arbitration. To reach this conclusion, the majority relied in part on the conclusion that the potential for collective actions reflected a Congressional intention to exclude individual ADEA claims from arbitration. *Nicholson*, 877 F.2d at 228-29. In dissenting from this view, Judge Becker began by opining that "arbitrations may in fact go forward as class actions." *Id.* at 240. Surely, *Gilmer* would not have relied expressly upon Judge Becker's dissenting opinion if it intended to permit arbitration agreements to foreclose the pursuit of class actions altogether.

**5. The Federal Policies Underlying The FAA And TILA Can And Should Be Reconciled To Protect The Private Enforcement Of TILA Within An Arbitral Forum.**

The importance that Congress attached to the availability of class actions in the private enforcement of TILA can be, and should be, reconciled with the federal policy giving due regard to the enforcement of freely negotiated agreements to arbitrate. Each statute should be given its full effect. If special care is taken to protect the due process rights of absent class members, then TILA class actions may be appropriate for arbitration. *See Keating v. Superior Court, Alameda County*, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980) ("there is no insurmountable obstacle to conducting an arbitration on a class-wide basis"), *superseded*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds, Southland v. Keating*, 465 U.S. 1 (1984); *see also Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. 1991); *Blue Cross of*

*California v. Superior Court*, 78 Cal. Rptr. 2d 779, 781 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 103 (1999); *Gainey v. Occidental Land Research*, 231 Cal. Rptr. 249, 250-51 (Cal. Ct. App. 1986); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 321-22 (Cal. Ct. App. 1986). The precise contours of such a scheme may be left to the district courts and the parties to develop and adapt to the particular demands of each class action.

Some courts, including the district court below, *see* Pet. App. 46a-48a, 53a-54a, will not permit class actions to proceed through arbitration absent an express provision for them. *See, e.g., Champ v. Siegal Trading Co.*, 55 F.3d 269, 274-77 (7th Cir. 1995) (holding that section 4 of FAA requires that the agreement be enforced as drafted, precluding class actions absent express provision for them); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674-75 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994); *Med. Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998). Other courts have declined to enforce arbitration agreements which would have foreclosed the availability of class actions under TILA and other consumer statutes. *See Johnson*, 82 F. Supp. 2d at 271 ("possibility of class action liability" critical to ensure voluntary compliance with TILA); *Lozada v. Dale Baker Oldsmobile*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999).

The better approach is to reconcile the interests of the FAA and TILA by permitting class actions to proceed to arbitration under rigorous procedural protections. Given the importance that Congress attached to the availability of class actions for the TILA enforcement scheme, arbitration agreements should not be enforced absent express provision for class actions.

## CONCLUSION

The judgment of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 South Court St.
P.O. Box 4276
Montgomery, AL 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 North Prairie St.
P.O. Box 350
Union Springs, AL 36089
(334) 738-4225

JOSEPH M. SELLERS*
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Ave., N.W.
West Tower, Suite 500
Washington, DC 20005
(202) 408-4600

ANGELA L. KIMBROUGH
FORD & KIMBROUGH
104 Main Street
Eutaw, AL 35462
(205) 372-9635

*Attorneys for Respondent*

July 24, 2000

* *Counsel of Record*

# APPENDIX

# APPENDIX — RELEVANT STATUTES

## 9 U.S.C. § 16
## Appeals

**(a)** An appeal may be taken from —

**(1)** an order —

**(A)** refusing a stay of any action under section 3 of this title,

**(B)** denying a petition under section 4 of this title to order arbitration to proceed,

**(C)** denying an application under section 206 of this title to compel arbitration,

**(D)** confirming or denying confirmation of an award or partial award, or

**(E)** modifying, correcting, or vacating an award;

**(2)** an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

**(3)** a final decision with respect to an arbitration that is subject to this title.

**(b)** Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

**(1)** granting a stay of any action under section 3 of this title;

**(2)** directing arbitration to proceed under section 4 of this title;

**(3)** compelling arbitration under section 206 of this title; or

**(4)** refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15; renumbered Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

* * *

**28 U.S.C. § 1920**
**Taxation of Costs**

A judge or clerk of any court of the United States may tax as costs the following:

**(1)** Fees of the clerk and marshal;

**(2)** Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

**(3)** Fees and disbursements for printing and witnesses;

**(4)** Fees for exemplification and copies of papers necessarily obtained for use in the case;

**(5)** Docket fees under section 1923 of this title;

**(6)** Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

(June 25, 1948, c. 646, 62 Stat. 955; Oct. 28, 1978, Pub.L. 95-539, § 7, 92 Stat. 2044.)

* * * *

Supreme Court, U.S.
FILED
AUG 24 2000
CLERK

No. 99-1235

IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF OF PETITIONERS

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

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## REPLY BRIEF OF PETITIONERS

In their opening brief, Petitioners Green Tree Financial Corp.—Alabama and Green Tree Financial Corp. ("petitioners") demonstrated that the district court's order compelling arbitration of respondent's underlying federal claims was not a "final decision with respect to an arbitration" under 9 U.S.C. § 16(a)(3). Brief of Petitioners ("Pet. Br.") 19-30. Petitioners showed that the language of Section 16(a)(3), the structure of Section 16, and the purpose of the Federal Arbitration Act ("FAA") all confirmed that an order compelling arbitration in an "embedded" proceeding is not a "final decision." *Id.*

Further, petitioners explained that the arbitration agreement was enforceable under the FAA because respondent failed to satisfy her burden of showing that Congress intended to prevent private parties from agreeing to arbitrate disputes under the Truth in Lending Act ("TILA") or the Equal Credit Opportunity Act ("ECOA"). Pet. Br. 30-49. As to the issue of arbitration costs, petitioners first showed, contrary to the court of appeals' decision, that the arbitration agreement authorized the arbitrator to award respondent her costs in accordance with the requirements of TILA and ECOA. *Id.* at 36-39. Second, petitioners explained that respondent failed to satisfy her burden of proof by identifying what the costs of arbitration would be and showing precisely how such costs would be inconsistent with TILA or ECOA. *Id.* at 18, 41-42.

Finally, as to the issue of class actions, the Court need not address this issue, Pet. Br. 42-43 & n.12, but, if it did, the arbitration agreement is enforceable because respondent can effectively vindicate her substantive rights under TILA through individual arbitration. This argument is fully supported by *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), which held that merely because Congress anticipated some litigants would seek to proceed collectively does not mean that Congress sought to prohibit all agreements to arbitrate such claims individually. Pet. Br. 43-44. Moreover, Congress created incentives in TILA – actual damages, plus

statutory damages, costs, and a reasonable attorney's fee – that ensure that *individual* litigants could and would continue to prosecute meritorious claims under TILA. *Id.* at 46-48.

Respondent's brief ("Resp. Br.") calls none of these conclusions into question. Instead, her arguments proceed from a fundamental distrust of arbitration that is out of step with Congress' emphatic policy, recognized by this Court, in favor of arbitral dispute resolution.

## ARGUMENT

### I. AN ORDER COMPELLING ARBITRATION AND DISMISSING AN "EMBEDDED" PROCEEDING IS NOT A "FINAL DECISION" UNDER 9 U.S.C. SECTION 16(a)(3).

Respondent argues (Resp. Br. 9-28) that the district court's order compelling arbitration of her embedded lawsuit is a "final decision" under Section 16(a)(3). Her contentions are without merit and should be rejected.

1. Respondent agrees that Congress intended that the term "final decision" in Section 16(a)(3) should "'be construed in accordance with pre-existing . . . interpretations,'" Resp. Br. 9 (omission in original) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 632 (1998)), and that, under those prior interpretations, an "action qualifies as [a] 'final decision' when it 'ends litigation on the merits and leaves nothing for the court to do but execute the judgment,'" *id.* at 9-10 (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). These concessions foreclose respondent's argument here because an order compelling arbitration in an embedded proceeding does not "'end[] litigation on the merits'" given that "an 'arbitration cannot produce an enforceable result without further judicial action.'" *Id.* at 22 n.13 (quoting *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 (2d Cir. 1961)). As respondent recognizes, under the FAA, even after a court has compelled arbitration in an embedded proceeding, further judicial action will be necessary to "make[] what is already a final arbitration award a judgment of the court." *Id.* at 23 (internal quotation marks omitted).

Despite these settled principles, respondent argues that the district court's order in this case is final because "[t]here is no material difference . . . between appeals from orders compelling arbitration in independent proceedings and the appeal at issue here" in that, in both cases, "the rulings [are] issued in deference to arbitration and they dispose[] of the entire matter before the court." Resp. Br. 19. But that argument is clearly wrong. In an independent proceeding, which seeks only to compel arbitration, an order that compels arbitration is a "final decision" because it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. In contrast, in an embedded proceeding, which seeks relief on the merits apart from the issue of arbitrability, an order that compels arbitration does not "dispose of the entire matter before the Court" because further judicial involvement after the arbitration will be "necessary for [the arbitration] award to become enforceable." *Pererra* v. *Siegel Trading Co.*, 951 F.2d 780, 784 (2d Cir. 1992); see also 9 U.S.C. §§ 9, 10, 11.

Respondent acknowledges that further judicial action will be necessary, Resp. Br. 23, but she argues that such action does not affect finality because "confirmation of an arbitration award is simply akin to the execution of a judgment in a judicial forum." *Id.* Respondent is mistaken. The FAA provides detailed substantive standards governing post-arbitration review of arbitration awards. See 9 U.S.C. §§ 9, 10, 11. As this Court noted just last Term, during post-award review of an arbitration award, the district court is authorized "'to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect.'" *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1338 (2000) (quoting *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 275-76 (1932)). It is only *after* an arbitration award has been confirmed by a district court pursuant to Section 9 of the FAA, that the award "may be enforced as if it had been rendered in an action in the court." 9 U.S.C. § 13. Indeed, respondent acknowledges that confirmation under the FAA, unlike exe-

cution of a judgment, provides "an opportunity to obtain modification of an award." Resp. Br. 35 n.19.[1]

Nor does respondent call into question that the "embedded-independent framework" was, and remains, well established among the federal courts of appeals as the means for determining whether an arbitration order constituted a "final decision." See, *e.g.*, *Farr & Co.* v. *CIA. Intercontinental De Navegacion de Cuba, S.A.*, 243 F.2d 342, 345 (2d Cir. 1957); *Hartford Fin. Sys. Inc.* v. *Florida Software Servs., Inc.*, 712 F.2d 724, 728 (1st Cir. 1983) (Breyer, J.); *Rogers* v. *Schering Corp.*, 262 F.2d 180, 182 (3d Cir. 1959); see also Pet. Br. 24 n.6 (citing post-1988 cases). Although respondent argues that some courts of appeals differed regarding how to characterize "Section 4 motions to compel arbitration, which were brought in conjunction with Section 3 motions to stay litigation," Resp. Br. 14, she notes that where such proceedings were deemed "independent," they were "therefore appealable," and where they were deemed "embedded," they were "therefore unappealable," *id.* at 14 (citing *Hartford Fin. Sys.*, 712 F.2d at 728-29).[2] Here, the district court's order compelling arbitra-

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[1] Although respondent does not dispute that "arbitration cannot produce an enforceable result without further judicial action," *Lummus*, 297 F.2d at 86, she argues that *Lummus* should be ignored because it "was written before Section 16 was enacted." Resp. Br. 22 n.13. But that argument fails because respondent admits that Congress, in enacting Section 16(a)(3), sought to adopt the pre-existing "definition of 'final decision.'" *Id.* at 11.

[2] The decisions from outside the Eleventh Circuit cited by respondent do not undermine that conclusion. *See* Resp. Br. 12. In *Sparling* v. *Hoffman Construction Co.*, 864 F.2d 635 (9th Cir. 1988), the Ninth Circuit did not address the question of jurisdiction. *Id.* at 637-39. In *Cedar Coal Co.* v. *United Mine Workers*, 560 F.2d 1153 (4th Cir. 1977), the Fourth Circuit ruled only that "an order dismissing a complaint with prejudice for failure to state a claim upon which relief may be granted . . . is a final appealable order under § 1291." *Id.* at 1161. Finally, the Third Circuit's 1991 decision in *Nationwide Insurance Co.* v. *Patterson*, 953 F.2d 44 (3d Cir.), could not have affected Congress' understanding of the law when it enacted Section 16 in 1988. Indeed, the *Patterson* Court confirmed that the law, as of 1988, was that "an order requiring arbitration is appealable as

tion clearly was entered in an "embedded" proceeding in which respondent sought relief under TILA and ECOA.

Next, although respondent initially agrees that courts must look to the substance of orders and "not the labels attached to the decisions," Resp. Br. 16, she later insists that the district court's label should control, regardless of substantive effect, because "stays and dismissals are governed by very different rules in Section 16 regarding their susceptibility to appeal." *Id.* at 17. Section 16(a)(3), however, draws no such distinction, and respondent never identifies how the label "dismissed," or "with prejudice," affixed by the district court in this case makes its order substantively different than the same order compelling arbitration if it were labeled a "stay." Because an order that requires "the parties to proceed to arbitration" and "stay[s] trial of the action pending filing of the award" "definitely" is "not final," *Schoenamsgruber* v. *Hamburg Am. Line*, 294 U.S. 454, 456 (1935), respondent must argue – against settled law – that appealability should turn on an "artificial[]" and "substanceless distinction between stays and dismissals." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 9 n.8 (1983); see also *Sullivan* v. *Finklestein*, 496 U.S. 617, 628 n.7 (1990) ("The label used by the District Court of course cannot control the order's appealability"). Indeed, respondent never addresses the anomaly that, under her interpretation, the district court would be empowered to transform unilaterally what is in substance an interlocutory order into a "final decision" through the simple expedient of the label affixed to the order, thereby circumventing the requirement in Section 16(b) that such interlocutory orders may be appealed only if the district court *and* the

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final . . . 'where it is not merely a step in the judicial enforcement of a claim . . . but is the full relief sought.'" *Id.* at 46 (quoting *Zosky* v. *Boyer*, 856 F.2d 554, 557 (3d Cir. 1988)); *see also John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998) (arbitration order in an "embedded" proceeding "cannot be considered a final order").

court of appeals conclude that 28 U.S.C. § 1292(b)(2) has been satisfied.[3]

2. Respondent also is mistaken in claiming that the "structure" of Section 16 supports an immediate appeal of the district court's order. Resp. Br. 20-24. She argues that Section 16(a)(3) should not be given a "pro-arbitration tilt" because (i) "neither the statutory language nor the legislative history . . . indicate that appellate jurisdiction for all appeals from orders compelling arbitration should be denied," *id.* at 21, and (ii) "Congress plainly contemplated appeals under circumstances other than those addressed specifically by the [other subsections of Section 16]," *id.*

First, there can be no dispute that Section 16 reflects a pro-arbitration bias. Sections 16(a)(1) and (a)(2) authorize immediate appeals from orders, whether final or interlocutory, that are hostile to arbitration. 9 U.S.C. § 16(a)(1), (a)(2). Section 16(b), in turn, denies immediate appeals as of right from interlocutory orders that favor arbitration. 9 U.S.C. § 16(b). Respondent provides no basis for ignoring the pro-arbitration bias in Section 16(a)(1), (a)(2) and (b), when interpreting the language of (a)(3), the one remaining subsection of Section 16. Nor can she dispute that this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as

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[3] Nor is the district court's order appealable under the "death knell" doctrine. Resp. Br. 13 n.7. Respondent's claim that "if she were compelled to proceed through arbitration alone," then "she would have to 'forego any claims she might have,'" *id.*, was unsupported both here and below, and is belied by respondent's ability to litigate and bear the costs associated with a case that has been active for more than four years in the district court, the court of appeals, and now this Court. Moreover, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) – the decision upon which her argument rests – held that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477.

"'the provisions of the whole law'" including "'its object and policy.'" *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). These principles compel the conclusion that Congress did not intend an expansive interpretation of "final decision" in Section 16(a)(3) because it would open the door to immediate appeals of a substantial number of orders that favor arbitration and thus undermine the FAA's "'statutory policy of rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips*, 120 S. Ct. at 1337 (quoting *Moses H. Cone*, 460 U.S. at 23). Thus, to the extent that there was any dispute among the courts regarding the meaning of "final decision" when Congress enacted Section 16, the pro-arbitration bias reflected in the structure of Section 16 supports the conclusion that Congress intended to adopt the less broad construction of "final decision" reflected in cases adopting the embedded/independent framework.

Nor does this reading "render Section 16(a)(3) superfluous." Resp. Br. 22. To the contrary, as respondent is aware, *id.* at 21 n.12, under petitioners' reading, an order compelling arbitration in an independent proceeding – a situation that is not addressed elsewhere in Section 16 – would be a "final decision" under Section 16(a)(3).

3. Finally, respondent argues that the "legislative history" may "be dispositive." Resp. Br. 25. She relies on a snippet from the congressional record which states, in a circular fashion, that a "final decision" under Section 16 includes "'a final judgment dismissing an action in deference to arbitration.'" *Id.* at 27 (quoting 134 Cong. Rec. at 31,065 (1988)). But as respondent recognizes, the legislative history also states that a decision is final "where there is nothing left to be done in the district court." *Id.* (internal quotation marks omitted). Thus, this evidence appears to do no more than reflect the embedded/independent framework. Where, as here, a court compels arbitration in an embedded proceeding, further court involvement is necessary because "arbitration cannot produce an enforceable result without further judicial action." *Lummus*, 297 F.2d at 86. Because the legislative history can be

construed as consistent with this meaning of "final decision," it should be so understood because a change in a judicial interpretation will not be presumed "without specific provision in the text of the statute." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 371, 380 (1988).

## II. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

Respondent argues, despite the "policy favoring enforcement of . . . agreements to arbitrate," that the court of appeals "properly barred enforcement of the agreement" in this case. Resp. Br. 28. Neither her unproved arbitration costs argument nor her putative class action argument establishes that Congress intended to preclude arbitration of her claims under TILA and ECOA.

At the outset, it is important to clarify the record. Respondent repeatedly states that "the $15 value of [her] claim," Resp. Br. 45, reflects that the "economic damages" in this case "are modest," *id.* at 8; see also *id.* at 34 (speculating that costs could have "dwarf[ed] the $15 value of [respondent's] actual damages"). As petitioners explained previously, Pet. Br. 46-47, TILA and ECOA permit recovery of not only actual damages, (15 U.S.C. § 1640(a)(1); *id.* § 1691e(a)), but also statutory damages of up to $2000 under TILA, (*id.* § 1640(a)(2)(A)), punitive damages of up to $10,000 under ECOA, (*id.* § 1691e(b)), *and* "the costs of the action, together with a reasonable attorney's fee" under both TILA and ECOA (*id.* § 1640(a)(3); *id.* § 1691e(d)). It is thus inexplicable that respondent continues, misleadingly, to suggest that the value of her claimed damages is $15 when her own Complaint seeks all of these categories of relief. J.A. 26-28 (Second Amended Compl.).[4]

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[4] Respondent also suggests that she never agreed to arbitrate, claiming that she "did not have the opportunity to read carefully the installment contract." Resp. Br. 2. That claim (i) is false factually because she testified that she "could have" reviewed the agreement, J.A. 49, (ii) was aban-

### A. The Arbitration Agreement Is Enforceable To Resolve Respondent's Claims Under The Truth In Lending Act And Equal Credit Opportunity Act.

Respondent makes three arguments regarding the "potential" costs associated with arbitration. First, she argues for a sweeping and unsupported change in federal law whereby an "arbitration agreement" will be held "unenforceable" unless it "ensure[s] that the costs [a plaintiff] would bear in arbitration [are] no greater than those that would be borne in court." Resp. Br. 30 (capitals altered). Second, recognizing that settled law places the burden of proof squarely on her, respondent insists that she satisfied that burden or, at worst, she "made the best record possible." *Id.* at 33. Finally, although she acknowledges that the cost and fee shifting provisions of TILA and ECOA "may apply by virtue" of the language of the arbitration agreement, *id.* at 37, respondent contends that the arbitration agreement is nevertheless unenforceable. These arguments are without merit.

1. Respondent's principal argument is that an arbitration agreement is unenforceable if it "fail[s] to ensure that the costs [a plaintiff] would bear in arbitration [are] no greater than those that would be borne in court." Resp. Br. 30 (capitals altered). That argument, if adopted, would constitute a radical change in the settled arbitration law whereby (i) every arbitration agreement covered by the FAA would be subject to challenge based on nothing more than an unsupported "concern" that arbitration might be more expensive than litigation, and (ii) the party seeking to enforce an arbitration clause would be required to allay that "concern" by proving both what arbitration costs might be and that they would not exceed litigation costs. Although respondent suggests that

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doned below, Pet. App. 22a n.3, and (iii) is frivolous because "a person who signs a contract is . . . bound thereby even if he or she fails to read the document." *Locklear Dodge City, Inc.* v. *Kimbrell*, 703 So. 2d 303, 306 (Ala. 1997) ("[t]o hold otherwise would turn the concept of 'sanctity of contract' upside down" and "would encourage irresponsibility").

this approach could be limited to "costs," which she insists "are *virtually unique* in their power to discourage parties from exercising their rights," *id.* at 31 (emphasis added), only pages later, respondent argues, apart from costs, that "absent the ability to aggregate their claims and proceed on a class wide basis," consumers also "would be unlikely" to exercise their rights under TILA in arbitration. *Id.* at 45. Respondent's *amici* complete the picture, arguing that this Court should adopt this presumption against arbitration based on their "concerns" about discovery, arbitrator competence, arbitrator bias, appellate review and virtually every other aspect of the arbitral process.[5] Taken together, respondent and her *amici*'s arguments constitute a wholesale break with settled law in favor of an approach that presumes that arbitration is suspect and imposes the burden of proof on the party seeking enforcement of the arbitration agreement.

These arguments misunderstand the purpose of the FAA and provide no basis for undoing this Court's settled precedent. As the Court has explained, Congress enacted the FAA "to ensure 'that private agreements to arbitrate are enforceable.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Congress understood that the procedures associated with arbitration and litigation differ, but Congress nevertheless decided that private parties should be able to choose arbitration over litigation. See 9 U.S.C. § 2. Respon-

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[5] *See, e.g.*, *Amicus Curiae* Brief of the National Association of Consumer Advocates 12 ("limits on discovery in arbitration . . . make it impossible for consumers to prove" their cases); *id.* at 19 ("any right to appeal is essentially eliminated"); *id.* at 24 (arguing that "[a]rbitrators are often biased"); Brief *Amicus Curiae* of Consumers Union 21 ("There is no way to know whether arbitrators, even if they have expertise to do so, will follow the law"); Brief *Amici Curiae* of AARP and the National Consumer Law Center 24 (arguing that "it is difficult, if not impossible, to determine whether an aggrieved party's substantive rights have been upheld").

dent, however, argues for a standard that would deny any real choice because, in her view, an arbitration agreement is unenforceable unless the party seeking enforcement could establish that the costs of arbitration (or any other procedure that could "discourage parties from exercising their rights," Resp. Br. 31) would be the *same*, or more favorable, than those associated with litigation. As this Court has explained, however, the choice between arbitration and litigation is a tradeoff based on a series of competing concerns: "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).[6]

Relying on this understanding, this Court has held that the FAA manifests an "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, and that judicial "suspicion of arbitration," such as that advocated by respondent and her *amici*, is "far out of step with [the Court's] . . . strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 500 U.S. 477, 481 (1989). Indeed, respondent recognizes, but then ignores, that "[t]he federal policy favoring the enforcement of arbitration agreements is predicated on the assumption" that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.'" Resp. Br. 30 (quoting *Mitsubishi*, 473 U.S. at 628). As a result, the "burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express, Inc.* v. *McMa-*

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[6] Congress did not limit enforcement, as some *amici* suggest, to arbitration agreements made "*after* a dispute arises." *E.g.*, Brief *Amicus Curiae* of Consumers Union 28. Under the FAA, agreements to arbitrate disputes, whether "existing" or "thereafter arising," both are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

*hon*, 482 U.S. 220, 227 (1987); see also *Gilmer*, 500 U.S. at 26. In short, respondent's principal argument is inconsistent with and provides no basis for reconsidering this Court's "strong endorsement of the federal statutes favoring [arbitration]." *Rodriguez de Quijas*, 490 U.S. at 481.

2. Settled law dictates that *respondent* bears the burden of establishing that congressional intent to preclude arbitration appears in "the text of the [federal statute], its legislative history, or an 'inherent conflict' between arbitration and the federal statute's underlying purposes." *Gilmer*, 500 U.S. at 26 (quoting *McMahon*, 482 U.S. at 227). Respondent nowhere argues that the statutory texts or legislative histories of TILA or ECOA preclude arbitration. Nor does she undermine this Court's holdings that Congress' grant of concurrent jurisdiction over an underlying statutory claim in State and federal courts "constitutes explicit authorization" for parties to agree to arbitrate such claims. See *Rodriguez de Quijas*, 490 U.S. at 482; see also *Gilmer*, 500 U.S. at 29. Instead, she appears to argue that there is an "inherent conflict" between TILA and ECOA and arbitration because the agreement "failed to protect [respondent] from the imposition of prohibitive costs." Resp. Br. 7.

On this point, respondent has failed to carry her burden. As her brief makes clear, respondent's only effort to present evidence regarding the costs associated with the Green Tree arbitration provision was an afterthought in her Motion for Reconsideration, *after* the district court had ordered arbitration. Resp. Br. 3, 33-34. In the course of a "procedural due process argument," respondent made the following "showing":

> For purposes of this discussion, *we will assume filing with the AAA*, the filing fee is $500 for claims under $10,000 and this does not include the cost of the arbitrator or administrative fees. . . . AAA further cites $700 per day as the average arbitrator's fee.

Plaintiff's Motion for Reconsideration 8-9 (J.A. 14) (emphasis added). In reply, petitioners pointed out that respondent's

*assumption* that the AAA would conduct the arbitration was "without support in the record." Brief of Appellees 41 (J.A. 17). After reviewing these arguments, even the court of appeals acknowledged that it lacked a record "about how claimants fare under Green Tree's arbitration clause." Pet. App. 19a.[7]

Respondent's failure of proof stands in stark contrast to the decisions upon which she relies in which the party seeking to invalidate an arbitration agreement presented a clear record of the costs associated with arbitration. Resp. Br. 31-32; see also Brief of *Amici Curiae* Trial Lawyers for Public Justice, the National Employment Lawyers Association, and the Association of Trial Lawyers of America in Support of Respondent 8-11 (noting cases where claimants established record on issue of arbitration costs). In particular, respondent's reliance on *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), is utterly misplaced. Resp. Br. 35-36. In *Cole*, not only was the court of appeals presented with a clear record of the applicable arbitration costs and fees, 105 F.3d at 1480-81, but it *enforced* an ambiguous arbitration agreement, holding that "where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful," *id.* at 1485.[8] Indeed, respondent conceded in her brief in opposition that the court

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[7] Respondent's failure of proof is underscored by her resort, in lieu of evidence, to a series of empty adjectives. Resp. Br. 3 ("*intolerable* risk of incurring *excessive* arbitration costs"); *id.* at 7, 28, 34, 35 ("risk" of "*prohibitive* costs"); *id.* at 29 ("risk of *high* costs"); *id.* ("*potentially large* arbitration costs"); *id.* at 30 ("failed to protect against . . . *exorbitant* arbitration costs"); *id.* at 33, 35 ("risk" of "*substantial* costs"); *id.* at 33 ("*potentially high* costs") (emphases added).

[8] The same is true under Alabama law. *Sullivan, Long & Hagerty* v. *Southern Elec. Generating Co.* 667 So. 2d 722, 725 (Ala. 1995) (explaining that contracts are construed to uphold their validity); *cf. Lackey* v. *Central Bank*, 710 So. 2d 419, 422 (Ala. 1998) (under Alabama law, the rule of *contra proferentem*, *i.e.*, ambiguity must be construed against the drafter, is "a rule of last resort that should be applied only when other rules of construction have been exhausted").

of appeals' decision in this case created a circuit conflict with the *Cole* decision. Opp. 14 & n.8.

Aware that she has failed to provide any evidence of arbitration costs under the arbitration agreement, respondent argues that (i) she "was unable to present additional evidence of the actual costs of arbitration" because "Green Tree apparently entrusted broad discretion to its arbitrators," Resp. Br. 34, and (ii) she should not be "expected to commence the arbitration . . . to ask the arbitrator assigned . . . about the costs of arbitration," *id.* at 35. These arguments are wrong. Under the arbitration agreement, the choice of arbitrator is a joint decision shared by Green Tree and respondent. Pet. App. 57a. Nothing prohibited respondent from asking an arbitrator proposed by Green Tree "about the costs of arbitration." Resp. Br. 35. Nor was she prevented from conducting discovery to determine the scope of arbitration costs. Despite having ample opportunity to do so, respondent failed to sustain her burden by presenting any relevant evidence of arbitration costs under the arbitration agreement in this case.[9]

3. Finally, even if respondent had presented evidence regarding the costs associated with arbitration under her agreement, that would not have established an "inherent conflict" between arbitration and TILA and ECOA's underlying purposes. See *Gilmer*, 500 U.S. at 26. TILA and ECOA do not insulate a plaintiff from litigation costs in federal or in State court. For example, since this lawsuit was filed more than 4½ years ago, J.A. 1, petitioners and respondent have been required to bear the costs of litigation associated with discovery and motions practice before the district court, J.A. 1-16, multiple rounds of briefing and an oral argument before the court of appeals, J.A. 17-19, and two sets of briefing before this Court. Yet there is no plausible argument that the magnitude

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[9] Contrary to respondent's suggestion, the court of appeals never "construed Green Tree's silence in its arbitration agreement as an unwillingness to bear such costs." Resp. Br. 35 (citing Pet. App. 17a-18a). Respondent has never asked whether, or under what circumstances, petitioners might be willing to pay her share of arbitration costs.

of this litigation burden creates an "inherent conflict" with TILA or ECOA. Instead, in TILA and ECOA, Congress addressed concerns about costs by ensuring that a prevailing plaintiff will recover "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d).

Although respondent recognizes that, under the agreement, the arbitrator "may apply" the fee shifting provisions of TILA and ECOA, Resp. Br. 37, she erroneously maintains that this is inadequate, *id.* at 37-39. In this regard, her concern that the arbitrator may "not follow the fee-shifting provisions of TILA and ECOA," *id.* at 37 n.21, is answered by this Court's decisions which hold that "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 30; *Mitsubishi*, 473 U.S. at 636-37. But even if the arbitrator were to disregard the law, review under the FAA is "sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 32 n.4; *Mitsubishi*, 473 U.S. at 636-37 & n.19.

Similarly misguided is her suggestion that recovery of costs under TILA and ECOA would not include "the cost of an arbitrator's time or the additional expenses of arbitration." Resp. Br. 38. First, if, as respondent claims, recovery of these costs is essential to vindication of her federal rights under TILA and ECOA, then plainly the arbitration agreement, which grants the arbitrator "all powers provided by the law and Contract" and "all legal and equitable remedies," in conjunction with the statutory mandates of TILA and ECOA, would authorize an arbitrator to award respondent these arbitration costs. As this Court has explained, "[w]here the parties have agreed that the arbitral body is to decide" a claim "arising from the application of [federal law]," the arbitral body "should be bound to decide that dispute in accord with the [federal] law giving rise to the claim." *Mitsubishi*, 473 U.S. at 636-37.

Respondent's claim that *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), suggests a different result is baseless. There, the Court held that "absent explicit statutory or contractual authorization" a party seeking recovery of "the expenses of a litigant's witness" based solely on Federal Rule of Civil Procedure 54(d) was "bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* at 445. Here, TILA and ECOA explicitly provide that a prevailing plaintiff shall recover "the costs of the action" as part of an award of damages, 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d), and the agreement provides the arbitrator with express authority to award "all legal and equitable remedies" in connection with "all disputes arising under case law, statutory law, and all other laws." Pet. App. 57a. Thus, unlike the district court in *Crawford*, where the only authority to award "costs" was Rule 54(d), an arbitrator resolving respondent's claims would have ample authority under TILA, ECOA and the arbitration agreement to award respondent her arbitration costs if she prevailed.[10]

Finally, respondent complains that "even if the costs of arbitration were covered by the fee shifting provisions of TILA and ECOA, such costs would only be recoverable in the event that [she] prevailed on her statutory claims." Resp. Br. 38. To the extent that respondent contends that she should recover her costs whether or not she prevails, neither TILA nor ECOA supports this view. Cf. 15 U.S.C. § 1640(a); *id.* § 1691e(d). Congress plainly did not seek to provide incentives for non-meritorious claims. And, to the extent respondent contends her rights under TILA and ECOA would be hindered because the costs of arbitration would be "substantially greater than those borne in a judicial forum," Resp. Br.

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[10] Respondent acknowledges that she could seek modification of an award if the costs assessed were insufficient, Resp. Br. 35 n.19, but speculates that such review does not provide "adequate protection," *id.* Although such review "necessarily is limited," this Court has made clear that it "is sufficient to ensure that arbitrators comply with the requirements of the statute." *Gilmer*, 500 U.S. at 32 n.4; *McMahon*, 482 U.S. at 232.

28; *id.* at 38, she has failed to present evidence regarding the costs of arbitration *or* the costs of litigation.[11]

Nor can respondent blandly assume that litigation costs would be lower. The delay and high costs of litigation are prime reasons that Congress enacted the FAA. See S. Rep. No. 68-536, at 3 (1924) (the FAA, by avoiding "the delay and expense of litigation," will appeal "to big business and little businesses, . . . corporate interests [and] . . . individuals"); H.R. Rep. No. 97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777 ("The advantages of arbitration are many: it is usually cheaper and faster than litigation"). Indeed, this Court recently explained that "Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind" because "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix, Inc.* v. *Dobson*, 513 U.S. 265, 280 (1995).[12]

### B. Congress Did Not Intend To Preclude Individual Agreements To Arbitrate Truth In Lending Act Claims.

If the Court addresses respondent's claim regarding her inability to proceed collectively in arbitration, that claim should be rejected based on settled precedent.

1. *Gilmer*, 500 U.S. at 32, is controlling. In *Gilmer*, this Court considered and rejected the argument that "arbitration procedures cannot adequately further the purposes of the ADEA [Age Discrimination in Employment Act] because

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[11] Because respondent's alleged damages far exceed the $3,000 jurisdictional limit for small claims court in Alabama, Ala. Code § 12-12-31(a), she simply could not "have prosecuted her claim in the small claims court" for a "filing fee" of "$57," Resp. Br. 33 n.18.

[12] Thus, contrary to the suggestion of respondent's *amici* (*see* Brief *Amicus Curiae* of Consumers Union 8-19; Brief *Amicus Curiae* of Public Citizen 5-18), there is no basis in the text or legislative history of the FAA to create a "consumer" exception to the federal policy in favor of arbitration.

they do not provide for . . . class actions." *Id.* The Court did not, as respondent suggests, rely on the fact that "*Gilmer* involved only an individual action." Resp. Br. 46. Indeed, the respondent in *Gilmer* made precisely that point, arguing that that "unavailability of a class action has no bearing on whether arbitration is sufficient" because "Petitioner's claim [is] an individual one." See Brief on the Merits of Respondent at 21-22, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (No. 90-18). The Court did not adopt that argument, but instead held that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a class action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted). Because there is no reason to treat claims under TILA differently than claims under the ADEA, *Gilmer* provides a complete answer to respondent's argument.

2. Nor are class action procedures essential for respondent effectively to vindicate her rights under TILA. To argue otherwise, respondent mischaracterizes her claim as limited to the recovery of $15 in "economic damages," Resp. Br. 45, and contends that "[g]iven the limited economic damages at issue individually," a class action is "the only viable means of prosecuting" the claims of respondent and members of the putative class. *Id.* That argument ignores that Congress provided remedial incentives to ensure that plaintiffs could and would bring individual suits under TILA. Thus, if respondent prevails, TILA provides that she shall recover "any actual damage," statutory damages of up to $2000, *and* "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a).[13] Given these incentives, respondent sim-

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[13] That these structural incentives make individual TILA actions economically viable is clear because "TILA cases brought by individuals" have made their way to this Court. Resp. Br. 42 n.25; Pet. Br. 47 n.13 (citing cases). Indeed, the principal case respondent cites to argue that "Congress expected consumers to enforce TILA as 'private attorneys gen-

ply cannot demonstrate that she (or any of the members in her *putative* class) could not effectively vindicate statutory TILA rights through individual arbitration. And, "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

3. Finally, respondent contends that the legislative history of TILA reflects that "Congress believed that the availability of class action liability was critical to securing compliance with the TILA." Resp. Br. 43. As petitioners demonstrated previously, the legislative history does not support the conclusion that Congress intended class actions to provide the sole means for securing compliance with TILA. Pet. Br. 48 n.16. Indeed, respondent does not address the statements in the legislative history that make clear that Congress envisioned that "consumers" would continue to "bring individual or class actions against creditors" and that the amendments did not "preven[t] a series of individual civil actions." S. Rep. No. 93-278, at 15, 16 (1973). Moreover, her claim that class actions are essential to ensure compliance with TILA, Resp. Br. 43, ignores not only the incentives for litigation by individuals, but also that TILA authorizes governmental agencies to bring enforcement actions to ensure compliance with TILA and to obtain class-wide relief for aggrieved consumers. Cf. *Gilmer*, 500 U.S. at 32 (rejecting claim that class actions were essential because "arbitration agreements will not preclude the [federal agency] from bringing actions seeking class-wide relief"); Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners 19-29 (noting enforcement efforts of governmental agencies). Indeed, no State or federal agency is participating in this case to argue that enforcement of TILA

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eral,'" Resp. Br. 41 (quoting *McGowan* v. *King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978)), was an individual action in which the plaintiff recovered $218.02 in statutory damages, plus "the costs of the action and a reasonable attorney's fee." *Id.* at 850.

requires that all prospective TILA plaintiffs be denied the right to choose to arbitrate their claims through individual arbitration.

In sum, respondent cannot remotely satisfy her heavy burden to show that there is an "inherent conflict" between the arbitration process and TILA and ECOA that would justify rendering her private agreement to arbitrate unenforceable.[14]

## CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

August 24, 2000

[14] Finally, respondent's claims that she did not "waive her right to bring a class action by agreeing to arbitrate her claims," Resp. Br. 45 n.30, and that courts may "permit[] class actions to proceed to arbitration," *id.* at 48, are not properly before the Court. Respondent waived these issues by arguing to the court of appeals that "Green Tree's form contract does not provide for consolidation of complaints" and that "the right to a class action . . . cannot be duplicated in arbitration." Brief for Appellant 15, 24 (J.A. 17) (capitals altered).

(20)

No. 99-1235

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## SUPPLEMENTAL BRIEF OF PETITIONERS

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

September 1, 2000

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## SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 25.5 of the Rules of this Court, Petitioners Green Tree Financial Corp.—Alabama and Green Tree Financial Corp. ("petitioners"), submit this supplemental brief to alert this Court of the Third Circuit's recent decision in *Johnson* v. *West Suburban Bank*, No. 00-5047 (3d Cir. Aug. 29, 2000) (Becker, C.J.).[1] In *Johnson*, which is reproduced in the appendix to this brief, Supplemental Brief Appendix 1a-22a ("Supp. Br. App."), the Third Circuit, in a scholarly and thorough opinion, held that it could "discern no congressional intent to preclude the enforcement of arbitration clauses in [the Truth in Lending Act's ("TILA's")] text, legislative history, or purpose" and therefore such clauses "are effective even though they may render class actions to pursue statutory claims under the TILA . . . unavailable." *Id.* at 3a.

Specifically, the Third Circuit, through Chief Judge Becker, explained that (i) "arbitration does not eliminate plaintiff incentives to assert rights under [TILA]" because the "sums available in recovery to individual plaintiffs are not automatically increased by use of the class forum" and (ii) arbitration does not "choke off the supply of lawyers willing to pursue claims on behalf of debtors" because "[a]ttorneys' fees are recoverable under TILA . . . and would therefore appear to be recoverable in arbitration." Supp. Br. App. 13a. As a result, the court rejected the argument that "compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter violations of

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[1] The Third Circuit reversed the district court's decision in *Johnson* v. *Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999), a ruling relied upon by respondent and her *amici*. Resp. Br. 41, 48; Brief *Amicus Curiae* of Public Citizen 22; Brief *Amicus Curiae* of Consumers Union 24-25; Brief *Amici Curiae* of AARP and the National Consumer Law Center 11, 12, 13, 21; Brief *Amicus Curiae* of Terry Johnson and the Illinois Consumer Justice Council, Inc. 1, 3-4, 8, 12-19.

[TILA]." *Id.* at 14a. The *Johnson* court added that the "availability of administrative enforcement mechanisms" "bolstered" its conclusion that "there is no irreconcilable conflict between the TILA's social policy goals and arbitration of claims that could have been heard as part of a class action." *Id.* (discussing available administrative enforcement mechanisms).

Similarly, relying on this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Third Circuit rejected the claim that TILA created "an unwaivable right to bring a class action." Supp. Br. App. 18a. In doing so, the *Johnson* court explained that "powerful punitive enforcement mechanisms remain available to administrative bodies under [TILA] even if these tools are not in the form of class actions." *Id.* at 19a. The *Johnson* court thus held that "[e]ven it [it] were to conclude that [TILA] implies a right to proceed as a member of a class, *Gilmer* indicates that rights of this nature are waivable so long as the rights the statute was designed to protect may be vindicated by other means." *Id.* at 20a.[2]

Respectfully submitted,

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
MICHAEL L. POST
LAUREL E. SHANKS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

September 1, 2000

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[2] The Third Circuit also rejected the plaintiff's argument that arbitration violated the Equal Credit Opportunity Act. Supp. Br. App. 20a-21a n.5.

# SUPPLEMENTAL APPENDIX

# SUPPLEMENTAL APPENDIX

[Filed August 29, 2000]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 00-5047

TERRY JOHNSON

*Appellee,*

v.

WEST SUBURBAN BANK; TELE-CASH INC.; COUNTY BANK OF REHOBETH BEACH, DELAWARE TELE-CASH INC.; COUNTY BANK OF REHOBOTH BEACH, DELAWARE,

*Appellants.*

---

On Appeal From the United States District Court
For the District of Delaware

(D.C. Civ. No. 99-cv-00104)
District Judge: Honorable Gregory M. Sleet

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Before: BECKER, Chief Judge, SLOVITER and NYGAARD, Circuit Judges.

BECKER, Chief Judge.

## OPINION OF THE COURT

This appeal arises under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* Plaintiff Terry Johnson, who entered into a short-term loan agreement with County Bank of Rehoboth Beach, Delaware ("Bank"), contends that the terms of the loan violated both the TILA and the EFTA. He seeks to bring a class action suit against both the Bank and Tele-Cash, Inc., which acted as the Bank's agent for the loan transaction. The Defendants respond that the dispute belongs in an arbitral forum, as the loan

agreement signed by Johnson contains an arbitration clause. This appeal presents the question, one of first impression in the Courts of Appeals, whether claims under the TILA and the EFTA can be referred to arbitration under an arbitration clause when a plaintiff seeks to bring a claim on behalf of multiple claimants.

Johnson submits that compelling arbitration is precluded by an "irreconcilable conflict" between the arbitration clause and the purposes of the TILA and the EFTA. He argues that Congress consciously inserted language into the statutes with the intent of encouraging district court judges to certify class actions under Fed. R. Civ. P. 23. He further maintains that in the legislative history of amendments to the TILA, Congress communicated that class action remedies play a central role in the TILA and EFTA enforcement schemes. Rather than simply provide restitution, Johnson asserts, such litigation is meant to serve public policy goals through plaintiffs who act as private attorneys general, for the class action device is necessary to ensure meaningful deterrence to creditors who might violate the acts.

The District Court agreed with Johnson that there was an "inherent conflict" between compelling arbitration and the TILA and the EFTA and denied the Defendants' motion to compel arbitration under the agreement. We will reverse. Though there may be some tension between the purposes of the debtor-protection statutes and arbitration, we are not persuaded that the two are so at odds as to preclude arbitration in this context. The Supreme Court has made clear that the presumption in favor of arbitration established by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, is a powerful one. Because neither the TILA nor the EFTA explicitly precludes the selection of arbitration instead of litigation, a party who agrees to arbitrate, but then asserts that his or her statutory claim cannot be vindicated in an arbitral

forum, faces a heavy burden. That burden has not been met here.

As a predicate to this conclusion, we note our belief that the public interest purposes behind the civil penalty provisions of the statutes are not in conflict with arbitration, even if arbitration clauses may prevent the bringing of class actions. To the extent that class actions serve public interest goals, those goals are also met by other provisions of the laws, which allow for enforcement of the statutes by federal agencies that possess sufficient sanctioning power to provide a meaningful deterrent to creditors who violate the terms of either act. Moreover, neither act grants potential plaintiffs any substantive right that cannot be vindicated in an arbitral forum. While it may be true that the benefits of proceeding as a class are unavailable in arbitration, neither statute confers upon plaintiffs the right to proceed as a class. Instead, the right is merely a procedural one, arising under Fed. R. Civ. P. 23, that may be waived by agreeing to an arbitration clause. In sum, because we can discern no congressional intent to preclude the enforcement of arbitration clauses in either statute's text, legislative history, or purpose, we hold that such clauses are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable.

I.

Johnson applied for and received a short-term loan for $250 from the Bank on July 10, 1998. The loan agreement disclosed an annual percentage rate of 917%, stemming from finance charges of $88 for the two-week loan. Thus, under the agreement, Johnson had to repay the loan by making one payment of $338 two weeks after receiving his $250. The loan agreement also contained the following arbitration clause:

> You and we agree that any claim, dispute, or controversy between us . . . and any claim arising from or relating to

> this Note, no matter by whom or against whom . . . including the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration by and under the Code of Procedure of the National Arbitration Forum . . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. [§§] 1-16.

App. 20. The loan agreement further provided:

> NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.
>
> By signing and sealing below, you agree to all of the terms of this Note, including the agreement to arbitrate disputes.

*Id.* at 20.

Johnson filed suit on behalf of a putative class in the District Court for the District of Delaware, alleging that the Bank and Tele-Cash, Inc., the bank's agent for the loan transaction, violated both the TILA and the EFTA by failing to properly disclose the high rate of interest, and by requiring loan applicants to open accounts from which they were required to irrevocably preauthorize electronic fund transfers to pay the loan.

The Defendants moved to stay the proceedings and compel arbitration. Concluding that arbitration was at odds with the purposes of the TILA and the EFTA, the District Court denied a motion to compel arbitration and stay the proceedings or dismiss the case. The District Court did, however, dismiss Johnson's claim that the arbitration clause was

unconscionable. The Defendants timely appealed. The District Court had jurisdiction to hear Johnson's action under 28 U.S.C. § 1331. Though the District Court's refusal to compel arbitration was interlocutory, such refusals are immediately appealable under the FAA. *See* 9 U.S.C. § 16(a) ("An appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title [or] denying a petition under section 4 of this title to order arbitration to proceed."). The question whether the TILA and the EFTA preclude arbitration when the plaintiff seeks to assert claims on behalf of a class presents a question of law over which our review is plenary.

II.

Whether a court can compel arbitration of TILA claims when the parties' loan agreement contains an arbitration clause but the plaintiff seeks to bring claims on behalf of multiple claimants is a question of first impression for this court. No other federal appellate court has squarely addressed the issue either. A number of district courts have ruled on the subject. Most of these rulings favor the view that the TILA does not preclude the pre-dispute selection by the parties of an arbitral forum should any controversy arise. *Compare Thompson v. Illinois Title Loans, Inc.*, No. 99-C-3952, 2000 WL 45493 (N.D. Ill. Jan. 11, 2000); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999); *Stout v. Byrider*, 50 F. Supp. 2d 627 (N.D. Ohio 1999); *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1997), *rev'd on other grounds*, 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (Apr. 3, 2000); *Lopez v. Plaza Fin. Co.*, No. 95-C-7567, 1996 WL 210073 (N.D. Ill. April 25, 1996); *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783 MHP, 1993 WL 307747 (N.D. Cal. Aug. 4, 1993), *with Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000).

In general, nothing prevents contracting parties from including a provision in their agreements that refers statutory claims arising under the contract to arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Arbitration of statutory claims will not be precluded absent congressional direction. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The burden of establishing that Congress meant to preclude arbitration for a statutory claim rests with the party who seeks to avoid arbitration. *See Gilmer*, 500 U.S. at 26. Such intention may be found in the text, legislative history, or in an "inherent conflict" between arbitration and the statute's underlying purposes. *Id.* (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)). "Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

It is the third category, inherent conflict, on which the District Court based its opinion. The Court concluded that an inherent conflict existed because "without the possibility of class action liability looming on a creditor's horizon, there is a very real possibility that these entities will not voluntarily comply with the Truth-in-Lending regulations." *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 271 (D. Del. 1999). We agree that if Johnson is to prevail, it must be on the basis of demonstrating an inherent conflict. There is nothing in either the text or the legislative history of the TILA to indicate that Congress intended to allow plaintiffs to avoid binding arbitration clauses. Both the statute and the legislative history, however, offer insight into the question whether an "inherent conflict" is to be found between the statute and arbitration.

A. Statutory Language

The TILA provides for civil liability for lenders who fail to give the disclosures required by the statute. *See* 15 U.S.C. § 1640. An aggrieved party is entitled to recover actual as well as statutory damages. Statutory damages can be twice the amount of any finance charge, but, for most transactions, they may not exceed $1,000 or fall short of $100. *See id.* §§ 1640(a)(1), (2). The statute specifically addresses the damages available in a class action, limiting the maximum potential recovery. Plaintiffs can recover

> in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor.

*Id.* § 1640(a)(1)(B). The statute further directs that

> [i]n determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

*Id.* § 1640(a).

Though the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them, or evince an intent by Congress that claims initiated as class actions be exempt from binding arbitration clauses. The "right" to proceed to a class action, insofar as the TILA is

concerned, is a procedural one that arises from the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23.

B. Legislative History

Johnson relies heavily on the legislative history behind several amendments to the TILA. After the law was first enacted, some courts were reluctant to certify class actions, in part due to the concern that large class awards could overwhelm lending institutions. *See generally Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972) (refusing to certify class of TILA plaintiffs when "the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement"). In 1974 Congress responded by enacting the limitations on class action recovery discussed above. In so doing, it created some legislative history that bespeaks the potential role that class actions are meant to play in the enforcement of the TILA's substantive requirements. Johnson contends that this history demonstrates Congress's intent to preserve a statutory class action remedy under the TILA.

Most of the language favorable to Johnson is found in a report of the Senate Committee on Banking, Housing and Urban Affairs pertaining to the 1974 amendments. We quote from it at length.

> A problem has arisen in applying these minimum liability provisions in class action suits involving millions of consumers. If each member of the class is entitled to a minimum award of $100, a creditor's liability can be enormous. For example, if a large national department store chain with 10 million customers fails to include a required item of information on its monthly billing statement, it can be subject to a minimum liability of $1 billion in a class action suit.
>
> . . . .

> The purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interest of both creditors and consumers.
>
> . . . .
>
> . . . . The Committee believes the present ambiguities and uncertainties with respect to class action suits under Truth in Lending should be clarified. Moreover, the Committee agrees with the Federal Reserve Board that "potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure" and that such remedies should not be restricted to actual damages. As the Committee pointed out in its report on similar legislation last year, "Most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to insure compliance."
>
> Accordingly, the Committee again decided to place an aggregate limitation on a creditor's class action liability for violations not involving actual damages.

S. Rep. No. 93-278, at 14-15 (1973). The conference report for the final legislation is far less expansive, not discussing the purposes of the caps in any great detail, but stating that "[t]he limitation on class action suits was further limited to the lesser of $100,000 or 1 percent of the net worth of the creditor to protect small business firms from catastrophic

judgments." H.R. Conf. Rep. No. 93-1429 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6153.

Several years later, the cap on class action awards was raised from $100,000 to $500,000. At the time, the Senate report, prepared by the Banking, Housing and Urban Affairs Committee, noted:

> The chief enforcement tool will continue to be private actions for actual damages and civil penalties. . . .
>
> . . . . The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized. . . .
>
> The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor.

S. Rep. No. 94-590, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 438.

Though Congress did not address the role of arbitration in the legislative history, Johnson urges that the history recited above demonstrates the centrality of class actions to the TILA's effective enforcement.[1] Accordingly, we turn to consider whether an arbitration clause that precludes bringing

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[1] Insofar as the committee did endorse class actions, it should be noted that the endorsement was not unequivocal. The committee said it would be considering alternatives to class actions in the future, adding "[w]e are hopeful that there may be workable and effective substitutes for the class action as a consumer enforcement device . . . ." *Id.*

a class action suit under the TILA irreconcilably conflicts with the statute.

C. Statutory Purposes

Because nothing in the legislative history or the statutory text of the TILA clearly expresses congressional intent to preclude the ability of parties to engage in arbitration, Johnson must demonstrate that arbitration irreconcilably conflicts with the purposes of the TILA. While Johnson may be correct in arguing that Congress contemplated class actions as a part of the TILA enforcement scheme, and even that class actions were self-consciously promoted by Congress in amending the statute, he falls short of demonstrating irreconcilable conflict between arbitration and the TILA.

1. TILA's public policy goals

Johnson focuses on the ability of a class action award to act as a penalty against lenders who violate the TILA. This focus is logical. The prospect of a class action award will doubtless deter TILA violations more effectively than the prospect that debtors will pursue individual actions, either in court or in arbitration, because the damages available to individuals are generally limited. *See* 15 U.S.C. § 1640. In this manner, argues Johnson, class actions are central to TILA's purposes, because the statute's civil damages provisions are not remedial, but rather, given the frequent absence of actual damages, are designed to deter unfair credit practices. Phrased another way, the TILA, in Johnson's submission, is meant to encourage private attorneys general, and the statute as a whole is intended for public purposes rather than private grievances. While these arguments carry force, they are ultimately unpersuasive, for they do not translate into a conclusion that class actions are necessary to provide deterrence or fulfill any of the other goals of the Act.

a. The effects of arbitration on private litigation

First, even if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by the TILA. These rights remain available in individual arbitration proceedings. The Supreme Court has made clear that when arbitration will preserve a plaintiff's substantive rights, compelling arbitration in accordance with an arbitration clause will not impede a statute's deterrent function. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). Johnson does not argue that the arbitral forum selected in his agreement is somehow inadequate to vindicate any of his rights under the TILA or that arbitrators would be unable to afford him any relief that he could individually obtain in a court proceeding, including injunctive relief or attorney's fees. *Cf. Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (Apr. 3, 2000) (reversing order compelling arbitration in a TILA case because the clause at issue "raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum"); *Baron v. Best Buy Co., Inc.*, 75 F. Supp. 2d 1368, 1370 (S.D. Fla. 1999) (appeal pending) (refusing to compel arbitration in a TILA case when arbitration agreement required parties to bear own expense for attorneys' costs in contravention of TILA provisions that provide for recovery of attorneys' fees).

Under the prevailing jurisprudence, when the right made available by a statute is capable of vindication in the arbitral forum, the public policy goals of that statute do not justify refusing to arbitrate. The notion that there is a meaningful distinction between vindicating a statute's social purposes

and adjudicating private grievances for purposes of determining whether a statute precludes compelling arbitration under a valid arbitration clause was rejected by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). That case concerned whether claims under the Age Discrimination in Employment Act ("ADEA") must be available in a judicial forum. The Court concluded otherwise, despite arguments based on the ADEA's important social policy goals. "As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims." *Id.* at 27 (citation omitted). Class actions could be similarly effective in promoting the ADEA's social policies, and, as discussed below, that statute lends itself more easily to being construed as creating a substantive right to a class action. *Gilmer* therefore appears to foreclose much of Johnson's argument.

We also note that while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act. The sums available in recovery to individual plaintiffs are not automatically increased by use of the class forum. Indeed, individual plaintiff recoveries available in a class action may be lower than those possible in individual suits because the recovery available under TILA's statutory cap on class recoveries is spread over the entire class. Nor will arbitration necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors. Attorneys' fees are recoverable under the TILA, *see* 15 U.S.C. § 1640(a)(3), and would therefore appear to be recoverable in arbitration, as arbitrators possess the power to

fashion the same relief as courts.[2] In sum, though pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts, we do not agree that compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter violations of the Act. Whatever the benefits of class actions, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20 (1985) (emphasis in the original).

b. The availability of administrative enforcement mechanisms

Our conclusion that there is no irreconcilable conflict between the TILA's social policy goals and arbitration of claims that could have been heard as part of a class action is bolstered by the statute's administrative enforcement provisions. These provisions offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role. The statute gives general enforcement power to the Federal Trade Commission as the "overall enforcing agency," and permits it to employ its powers under the Federal Trade Commission Act, *see* 15 U.S.C. § 1607(c), such as the issuing of cease and desist orders, *see* 15 U.S.C. § 45. The TILA also grants enforcement authority to the variety of federal agencies that have jurisdiction over various lending institutions, including the Office of the Comptroller

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[2] There does not appear to be a problem with securing the full range of remedies available under the TILA in this case because Rule 20(d) of the National Arbitration Forum, the arbitrators selected in the parties' contract, currently authorizes arbitrators to "grant any remedy or relief allowed by applicable substantive law and based on a Claim, Response, or Request properly submitted by a Party under this Code." Of course if the arbitral rules in question precluded the substantive relief made available by the statute, or the forum otherwise presented barriers to a plaintiff's assertion of his or her rights, we would have a different case.

of the Currency, the Federal Reserve Board, and the FDIC. *See* 15 U.S.C. § 1607(a). In addition to allowing these federal agencies to order the adjustment of inaccurately disclosed finance charges, *see id.* § 1607(e), the TILA cross references section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, to set forth other enforcement powers, *see* 15 U.S.C. § 1607(a). Therefore the agencies may, for example, impose monetary penalties of up to $5,000 per day (or of $25,000 per day if the violations are part of a pattern of misconduct), *see* 12 U.S.C. § 1818(i), or in some instances order the suspension and removal of institution directors or officers, *see* 12 U.S.C. § 1818(e).

Johnson responds by invoking the portion of the legislative history that speaks to the need to avoid "relying upon an extensive new bureaucracy." S. Rep. No. 93-278, at 14 (1973). This reference is of limited usefulness, for this snippet of legislative history does not indicate congressional intent that arbitration be precluded, or that individual actions are inadequate to serve the function of deterring violations of the TILA. It may be true that Congress saw value in maintaining the availability of class actions, but that does not translate to the conclusion that it intended to preclude private parties from contracting around their availability. Under the framework established by the Supreme Court, legislative history may be used to demonstrate congressional intent to preclude arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). When that history is used, as here, merely to demonstrate that the judicial remedies provided for or contemplated by a statute are important, it is of noticeably reduced value. The importance of statutory judicial remedies are always evident from their mere existence—Congress obviously enacted them for a reason. Were they not the object of a congressional goal, they would not have been enacted. It is therefore hard to see how the

legislative history relied upon by Johnson could possibly be dispositive.[3]

Insofar as Congress's intent, broadly contemplated, is concerned, we must give equal consideration to Congress's policy goals in enacting the FAA. The statute was intended to overcome judicial hostility to agreements to arbitrate, *see Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-21 & n.6 (1985), and it reflects "a liberal federal policy favoring arbitration agreements," *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). *See also* H.R. Rep. No. 68-96, at 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of this bill is simply to make the contracting party live up to his agreement."). Indeed, a Senate Judiciary Committee Report supporting the legislation explained that arbitration provides benefits to both consumers and businesses in speed and lower costs. "The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expense increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 68-536, at 3 (1924).

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[3] Moreover, even if legislative history were dispositive, there is similar history accompanying the original version of the TILA that indicates the importance of administrative enforcement in securing the rights of most consumers. The House Report, prepared by the Committee on Banking and Currency, explained that enforcement on the administrative level was essential to the legislative purpose of the Act. *See* H.R. Rep. No. 90-1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1975. "For the relatively unsophisticated consumer, particularly those of modest means, administrative enforcement will provide their only protection against unscrupulous merchants or lenders." *Id.* The report also characterizes the civil remedies as secondary to the administrative ones. "While primary enforcement of the bill would be accomplished under the administrative enforcement section discussed above, further provision is made for the institution of civil action by an aggrieved debtor." *Id.* at 1976.

Similarly, the committee found that there was general satisfaction among participants with arbitration. *See id.* A 1982 House of Representatives report reached similar conclusions, stating that "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling . . . ." H.R. Rep. No. 97-542, at 13 (1982). These benefits have been similarly recognized by the Supreme Court as being part of Congress's intent in passing the FAA. *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 280 (1995) (citing the 1924 Senate Report and the 1982 House Report). We therefore cannot consider the legislative history relied upon by Johnson without giving equal heed to the clear congressional policy behind the FAA.

In short, Johnson's reliance on the legislative history summarized in Part II.B is fundamentally flawed. He uses it not to show that Congress intended that parties could avoid a valid arbitration clauses if they wished to litigate a TILA claim, but rather, and in a more attenuated manner, to show that class actions have important purposes under the statute. But nothing in the cited passages demonstrates that parties cannot choose to waive judicial remedies in favor of arbitration. In any case, the loss of the availability of a class action does not mean the loss of meaningful deterrence to TILA violations, insofar as the public remedies discussed above remain. It may be true that the unavailability of class actions removes an incentive for lenders to comply with the statute, but it is far from the only incentive to do so.

We similarly do not view the fact that Congress seems to have self-consciously encouraged class actions as particularly telling. In acting to ease the certification of classes, *see supra* Part II.B, Congress did nothing to preserve the right to a class

action over arbitration or preclude opting for arbitration. Rather, it only altered the factors that judges consider in determining whether to allow the procedural right of a class action to be exercised. Notably, Congress did not add language compelling judges to recognize prospective classes under any circumstances. One can therefore look at the 1974 and 1976 amendments as efforts by Congress to place class actions on the same footing as any other lawsuit, no more or less subject to arbitration than a cause of action arising under any other statute.

2. Substantive Rights

Johnson also argues that the TILA does effectively create an unwaivable right to bring a class action. The strongest statement of this argument is as follows. Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims. Similarly, if class actions are precluded, arbitrators acting in lieu of courts would not have a basis for considering, in connection with a class remedy, the frequency and persistence of compliance failures by the creditors, the number of persons adversely affected, or the creditors' intent. *See* 15 U.S.C. § 1640(a).[4]

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[4] This court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure. *See Champ v. Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995). At oral argument, the parties indicated that the rules of the National Arbitration Forum, which govern the arbitration agreement here, preclude the joinder of actions unless all parties affirmatively consent. We therefore assume,

This argument is unavailing in light of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The ADEA, at issue in *Gilmer*, presented far more powerful textual support than the TILA for concluding that there is a right to proceed collectively despite the existence of an arbitration clause. The ADEA actually provides for collective litigation. *See* 29 U.S.C. § 626(b) (referencing the remedies in 29 U.S.C. § 216). "An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (emphasis added). In short, the statute creates a right to sue collectively, which is not similarly created by the TILA. Yet the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the class action remedy there (and also notwithstanding all of the public interests vindicated by the statute as discussed above in Part II.C.1). *See Gilmer*, 500 U.S. at 32.

Johnson argues that *Gilmer* is taken out of context vis-à-vis the provision for class actions because the Supreme Court noted that the EEOC, in enforcing the ADEA, could still seek class-wide relief, while the FTC is not similarly capable. We do not believe that this argument carries any force. As discussed above, powerful punitive enforcement mechanisms remain available to administrative bodies under the Act even if these tools are not in the form of class actions.

Furthermore, simply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability. This is manifest in the Supreme Court's treatment of the availability of class

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for purposes of this appeal, that Johnson's effort to pursue his claims as a representative of a class would be precluded by enforcement of the arbitration clause.

actions in *Gilmer*. "But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Gilmer*, 500 U.S. at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)) (alteration in the original). The same holds true for the TILA. Even if we were to conclude that the statute implies a right to proceed as a member of a class, *Gilmer* indicates that rights of this nature are waivable so long as the rights the statute was designed to protect may be vindicated by other means. We do not think this unfair. Only those who consent to credit agreements with binding arbitration clauses are forced to abandon this procedural avenue; those who do not consent to arbitration in their contracts have the full selection of forums.[5]

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[5] Of course even when arbitration clauses are included in agreements, they may be set aside if they are fraudulently induced or are in some way unconscionable. As noted above, Johnson did allege that his arbitration clause was unconscionable, but the District Court found no basis for the conclusion that the clause was in any way oppressive, in large part because the clause did not create an arbitration procedure that favors one party over another. *See Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 279 (D. Del. 1999). Though Johnson complains on appeal that the arbitration clause was a contract of adhesion, he does not make any argument to contradict the District Court's conclusion that the arbitration clause is not unconscionable.

Johnson also claims that waiver of judicial remedies through a contract of adhesion violates the Equal Credit Opportunity Act ("ECOA"), which prohibits discrimination against any credit applicant who exercised a right created under the chapter of the U.S. Code that includes the TILA. *See* 15 U.S.C. § 1691. But Johnson does not properly allege that there has been any discrimination, or that he exercised any right under any act. Johnson's purported authority for the proposition that the ECOA is applicable is *Owens v. Magee Fin. Serv.*, 476 F. Supp. 758 (E.D. La. 1979), and *Bryson v. Bank of New York*, 584 F. Supp. 1306 (S.D.N.Y. 1984). Both cases,

In sum, Johnson's arguments that the TILA precludes arbitration are unpersuasive. "[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). No such intent is deducible here.

III.

The District Court further held that compelling arbitration of claims arising under the EFTA irreconcilably conflicts with that statute as well. This ruling was based on the fact that the EFTA contains limitations on class action recovery that mirror those contained in the TILA. *Compare* 15 U.S.C. § 1640(a), *with* 15 U.S.C. § 1693m(a). The District Court inferred that Congress's use of identical language bespoke identical goals, and that Congress was seeking to encourage the certification of class actions under the EFTA as it had under the TILA. Because the Court had concluded that this goal created an inherent conflict with arbitration in the TILA

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however, presented strikingly different facts from those at issue here, as they involved oppressive conduct against individuals who actively sought to assert rights under the TILA. In *Owens*, a creditor defendant, already being sued for a TILA violation by the debtor, made additional credit contingent on the debtor's signing a settlement document of her active lawsuit. *See Owens*, 476 F. Supp. at 768. *Bryson* involved a denial of a loan application simply because an applicant inquired about the ability to obtain a loan without taking credit insurance. This was a violation because TILA provides consumers with the right to refuse to purchase such insurance unless the premium is included in the statement of the finance charge of the loan. *See Bryson*, 584 F. Supp. at 1318.

These differences aside, Johnson plainly cannot claim that Defendants' conduct violated the ECOA or its implementing regulation because, as we discuss in the text, we hold today that the arbitration clause contained in the loan agreement did not serve to deprive Johnson of any rights held under the TILA.

context, it followed that the same conflict was manifest when EFTA claims were arbitrated. *See Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 272 (D. Del. 1999). While we agree that resolution of the arbitration issue with respect to TILA claims would also apply to the EFTA, our disagreement with the District Court about whether the TILA precludes compelling arbitration commands a similarly contrary conclusion about the EFTA issue. The EFTA's class action language was drafted in 1978, after the identical language was placed in the TILA by the 1974 and 1976 amendments. *See* Electronic Fund Transfer Act, Pub. L. No. 95-630, § 915, 92 Stat. 3737 (1978) (codified at 15 U.S.C. § 1693m(a)). We do not believe that Congress would have different intended meanings for identical statutory language contained in similar statutes. Because there is no irreconcilable conflict between arbitration and the goals of the TILA, we similarly hold that claims arising under the EFTA may also be subject to arbitration notwithstanding the desire of a plaintiff who previously consented to arbitration to bring his or her claims as part of a class.

The order of the District Court denying the motion to stay proceedings and compel arbitration will be reversed and the case remanded for further proceedings consistent with this opinion.

Supreme Court, U.S.
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# In the Supreme Court of the United States

GREEN TREE FINANCIAL CORP.-ALABAMA AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

vs.

LARKETTA RANDOLPH,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF OF NATIONAL ARBITRATION FORUM AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

David F. Herr
*Counsel of Record*
Michael C. McCarthy
MASLON EDELMAN
BORMAN & BRAND, LLP
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

Edward C. Anderson
National Arbitration Forum
500 Rosedale Tower
1700 West Highway 36
Saint Paul, MN 55113
(651) 631-1105

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The National Arbitration Forum ("the Forum") submits this *amicus curiae* brief in support of neither party. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Forum consists of a nationwide network of more than 500 independent arbitrators — former members of the judiciary, law professors, and senior attorneys — and a professional staff, based in Saint Paul, Minnesota, that processes the claims much like a court clerk's office. In a recent decision upholding an agreement that provided for Forum-administered arbitration, the Forum was characterized as being "an impressive assembly of qualified arbitrators."[2]

Forum legal professionals serve as arbitrators in cases where the contract of the parties incorporates the Forum Code of Procedure[3] ("the Forum Code") or where the parties otherwise elect to submit their case to the Forum for

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[1] Pursuant to Supreme Court Rule 37.6, the Forum states that this brief was authored in its entirety by the Forum and its counsel. No person other than the Forum made a monetary contribution toward the preparation or submission of this brief.

[2] *Marsh v. First USA Bank*, No. 3:99-CV-0783-T, slip op. at 29 (N.D. Tex. May 23, 2000).

[3] *See* National Arbitration Forum, *Code of Procedure*, Rule 1A (Sept. 1, 1999) (hereinafter *Forum Code*), *available at* <http://www.arb-forum.com>.

resolution.[4] Hundreds of thousands of parties have entered into contracts that choose Forum-administered arbitration as the exclusive means for resolving disputes. Included among those contracts are many credit agreements between banks and consumers.

The Forum has a long-standing interest in seeing that arbitration is made available to all Americans as a simpler, less expensive, and faster alternative to litigation, as was envisioned by the drafters of the Federal Arbitration Act[5] ("FAA"). One means by which that objective can be met is consistent application of the FAA throughout the United States. Uniform application of the FAA to arbitration agreements should result in relatively limited judicial proceedings in advance of any arbitration, consistent with the purpose of the FAA. Inconsistent and incorrect interpretations of the FAA have fostered protracted judicial proceedings in advance of any arbitration, including discovery from providers of arbitration services such as the Forum, with the result that the path to arbitration can become as slow and expensive as if the entire dispute had been litigated.

Based on its years of experience as a provider of arbitration services, the Forum offers to the Court insights on the arbitration process and suggests a refinement of the processes used by courts to implement the FAA and its objectives. It has offered similar insights into the workings of arbitration and the proper application of the FAA as an *amicus* in federal trial and appeals courts.

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[4] *See id.* Rule 1B.

[5] 9 U.S.C. §§ 1-16 (1994).

## SUMMARY OF THE ARGUMENT

In applying and interpreting the FAA, this Court has repeatedly affirmed the importance of arbitration as an alternative to litigation. The Court has outlined a variety of advantages that arbitration has over litigation, the principal advantages being that it is cheaper, simpler, and faster. The Forum's first-hand experience and numerous studies of the means of dispute resolution confirm that arbitration provides many persons with access to justice that, for a variety of reasons, these same persons could not obtain in the courts.

Although the issues presented in this case are arguably somewhat narrow — the availability of appellate review of federal court orders compelling arbitration and the arbitrability of claims brought under the Truth in Lending Act[6] ("TILA") — this case and these issues present an opportunity for the Court to reaffirm the importance of parties' honoring their agreements to arbitrate disputes and doing so in a manner, consistent with the terms of the FAA, that permits arbitration to proceed without parties first being subjected to protracted judicial proceedings.

In furtherance of these objectives, the Forum urges that the Court clarify the procedure for judicial review of an arbitration agreement that should occur under the FAA. Specifically, the Court should require that (1) pre-arbitration review be limited to determining whether the agreement to arbitrate satisfies applicable state contract-law standards; (2) intra-arbitration review of such matters as arbitration fees be permitted only when the parties have exhausted the means for resolving the

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[6] 15 U.S.C. § 1601 *et seq.* (1994).

matter within the confines of the arbitration; and (3) all other issues be reserved to post-arbitration review.

By reaffirming a standard procedure for judicial review of arbitration agreements that provides for very limited and expeditious pre-arbitration judicial proceedings, this Court will further the FAA's objectives of providing inexpensive, simple, and fast dispute resolution to all Americans.

## ARGUMENT

### I. Arbitration Serves an Important Public Purpose by Providing Inexpensive Access to Justice.

#### A. High costs of litigation keep many Americans from seeking justice in the nation's courts.

As an "adjunct" to the courts, arbitration provides Americans with access to justice that has otherwise become increasingly inaccessible. The American Bar Association ("ABA") calculates that 100 million Americans are locked out of court by high legal costs.[7] Objective surveys suggest that almost twice that number of Americans believe they cannot afford the cost of justice.[8]

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[7] *See Public Loses as Lawyers Block Access to Cheaper Legal Help*, USA Today, Feb. 19, 1999, at 14A.

[8] *See How The Public Views The State Courts: A 1999 National Survey*. National Conference on Public Trust and Confidence in the Justice System (May 14, 1999), *available at* <http://www.ncsc.dni.us/PTC/results/report.htm>; Supreme Court of Texas, Office of Court Administration and State Bar of Texas, *Public Trust and Confidence in the Courts and the Legal Profession in Texas Summary Report* 6 (1999).

The *ABA Journal* reports that most lawyers will not begin a lawsuit worth less than $20,000.[9] Lewis Maltby, of the National Work Rights Center, calculates that, for employees who seek a lawyer, the minimum is closer to $60,000.[10] Maltby predicts that access to justice will be even worse in the future.[11] Conversely, Maltby estimates that the costs of some arbitrations can be as little as five percent of the cost of an equivalent lawsuit.[12]

Arbitration is well received by Americans. Fifty-nine percent of respondents to a Roper survey for the ADR Institute selected arbitration over litigation as a way to resolve claims for money.[13] That percentage grew to 83% when respondents were informed that arbitration could save 75% of the cost of litigation.[14] Ninety-two percent of participants in securities arbitration responded favorably to the experience.[15] An ABA

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[9] *See* Jill Schachner Chanen, *Pumping Up Small Claims: Reformers Seek $20K Court Limits – With No Lawyers*, A.B.A. J., Dec. 1998, at 18, 18.

[10] *See* Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights, in Arbitration Now* 25 (Paul H. Haagan & ABA Section of Dispute Resolution eds. 1999).

[11] *See id.* at 29.

[12] *See id.* at 23.

[13] *See* Roper Starch Worldwide, Inc., *Legal Dispute Study* (Sept. 1999), *available at* <http://www.arb-forum.com> in the Forum Library.

[14] *See id.*

[15] *See Poll Shows Most See Broker-Client Arbitration Process as Fair*, Knight-Ridder News Service (Aug. 6, 1999).

study of consumer attitudes toward arbitration reached similar results.[16]

### B. The Forum offers arbitration grounded in substantive law.

What sets the Forum apart from many providers of arbitration services is that its arbitrators must apply the relevant substantive law. In making their decisions, Forum arbitrators — former judges, law professors, and attorneys with at least fifteen years' experience[17] — are bound by the Forum Code, the Forum Bill of Rights, the Due Process Standard, the Forum Code of Ethics, their local rules regarding professional responsibility, and the substantive law that governs the dispute.[18] The Forum's requirement that cases be decided under the applicable substantive law is a significant addition to rules common to arbitration organizations.[19]

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[16] *See* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication, in Consumer Dispute Resolution* 344 (ABA Special Comm'n on Dispute Resolution 1983).

[17] Communally, these arbitrators are by experience, training, and disposition, models of the "competent, conscientious and impartial arbitrators" to whom this Court has referred. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

[18] *See Forum Code, supra* note 3, Rules 1C, 20A, 20D.

[19] *See* National Arbitration Forum, *A Comparison of Arbitration Rules and Practices* (presented at the 2000 mid-year meeting of the ABA Business Law Section, Jan. 2000), *available at* <http://www.arb-forum.com>; *see also* Edward Brunet, *Replacing Folklore Arbitration*

As Professor Edward Brunet (author of the leading textbook on ADR[20]) states, "The Forum's restriction on subjective awards illustrates the growing acceptance of legally based arbitral awards."[21] In arbitration of statutory claims, this Court has held that parties are entitled to their substantive statutory rights.[22] The United States Court of Appeals for the D.C. Circuit has stated, at least in the case of contracts to arbitrate statutory claims, that this Court "has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law."[23]

### C. Millions of Americans have chosen to resolve their disputes through arbitration.

Arbitration has become an important component of the justice system. Seventy-seven million Americans who now own securities have committed themselves to arbitration,

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*with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39 (1999).

[20] Edward J. Brunet & Charles B. Craver, *Alternative Dispute Resolution: The Advocate's Perspective* (1997).

[21] *Brunet, supra* note 19, at 57.

[22] *See Gilmer*, 500 U.S. at 26.

[23] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468-69 (D.C. Cir. 1997).

directly or indirectly.[24] A growing number of "e-commerce" web sites contain an arbitration provision.[25]

Arbitration is used today in almost every type of transaction. This universal acceptance is far beyond the limited and narrow applications of the past. In the future, arbitration will be a necessity in "on-line" transactions (*i.e.*, "e-commerce"), and many of those arbitrations will be administered by the Forum.

After an audit of the Forum's procedures, the American Institute of Certified Public Accountants ("AICPA") selected the Forum to provide arbitration services to resolve claims resulting from on-line transactions in connection with web sites that take part in AICPA's CPA WebTrust program.[26] WebTrust covers e-commerce in the United States, Canada, Puerto Rico, England, Scotland, Ireland, and Wales.[27] E-commerce is expected to generate hundreds of millions of transactions annually.

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[24] *See* Richard Nadler, *The Rise of Worker Capitalism*, Cato Policy Analysis, Nov. 1, 1999, at 1, 4; NASD Rule 10101, "Matters Eligible for Submission," *available at* <http://www.nasdr.com/2820_.htm#10101>.

[25] *See, e.g.*, Dell Computer's "Terms and Condition of Sale," *available at* <http://www.dell.com>.

[26] *See CPA WebTrust Now Most Comprehensive Seal of Assurance for Electronic Commerce Web Sites*, Bus. Wire (Mar. 31, 1999). The AICPA is the national association of CPAs in the United States with more than 330,000 members in public practice, business and industry, government and education. *See id.*

[27] *See id.*

Arbitration has also been chosen as the preferred method of dispute resolution with respect to the architecture of the Internet. The Internet Corporation on Assigned Names and Numbers ("ICANN") was created by the United States government to effectively manage the more than 10 million "domain" names now on the Internet.[28] As part of that effort, ICANN has selected the Forum as one of four worldwide providers of arbitration of disputes related to domain names and trademark rights.[29]

## II. The FAA's Preference for Arbitration Should Result in Courts Rarely Voiding Agreements To Arbitrate.

The limited pre-judicial review of arbitration agreements advanced by the Forum finds support in the FAA's preference for arbitration over litigation as a means of dispute resolution.

### A. The Court has held that the FAA states a preference for arbitration.

In 1995, when this Court decided *Allied-Bruce Terminix Cos., Inc. v. Dobson*,[30] it restated a strong preference for

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[28] *See* U.S. Department of Commerce, Domain Name System Statement of Policy, Docket No. 980212036-8146-02, *available at* <http//: www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm>.

[29] *See* Lubna Kably, *ICANN Names 4th Agency to Settle Domain Disputes*, The Economic Times, May 18, 2000, *available at* 2000 WL 16892861. The other approved providers are the Canadian eResolution Consortium, the United Nations' World Intellectual Property Organization, and the CPR Institute. *See id.*

[30] 513 U.S. 265 (1995).

arbitration. Examining the legislative history of the FAA to determine Congress's intent, the Court ascertained that Congress viewed the FAA as beneficial legislation for consumers and businesses alike.[31] It stated that the FAA, "by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals.'"[32]

The Court went on to state its own opinion on the Act: "Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[33] In effect, the FAA was drafted to provide all members of society access to justice, which they may not be able to afford in the traditional lawsuit system.[34]

### B. The FAA prefers arbitration over litigation because arbitration provides for practical and effective dispute resolution.

While examining the legislative history of the FAA in *Terminix*, the Court listed the qualities of the arbitration process that make it a preferred method of dispute resolution.[35] The court stated that arbitration (1) is "cheaper and faster than

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[31] *See id.* at 280.

[32] *Id.*

[33] *See id.*

[34] *See* Chanen, *supra* note 9, at 18.

[35] *Terminix*, 513 U.S. at 280.

litigation," (2) has "simpler procedural and evidentiary rules," (3) "minimizes hostility and is less disruptive of ongoing and future business dealings among the parties," and (4) is "more flexible in regard to scheduling of times and places of hearings and discovery devices."[36]

In the growing "on-line" world, where parties to transactions may physically be a continent or a globe apart, arbitration may be the only practical method to resolve disputes.

### C. The Court has held that arbitration agreements can be voided only on universal contract law grounds.

Section two of the FAA states that

> a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part, thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[37]

This Court, in determining how an arbitration agreement shall be scrutinized, has continually held that state-law contract principles guide the analysis.[38] In *Perry v. Thomas*, the Court

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[36] *Id.* (quoting H.R.Rep. No. 97-542, at 13 (1982)).

[37] 9 U.S.C. § 2 (1994).

[38] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995);

explained that "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[39] The *Perry* Court also stated that "[a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law."[40]

In *Terminix*, the Court stated that section two of the FAA assures that states have "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision."[41] It went on to explain that states may regulate all contracts under "general contract law principles."[42] The principle was also reiterated in *First Options of Chicago, Inc. v. Kaplan*, when the Court explained that courts apply "ordinary state-law principles that govern the formation of contracts" when determining whether parties agreed to arbitrate disputes.[43] The Court also implemented a state-law analysis in *Doctor's Associates, Inc. v. Casarotto*, when it held that the

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*Terminix*, 513 U.S. at 281; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

[39] *Perry*, 482 U.S. at 492 n.9.

[40] *Id.*

[41] 513 U.S. at 281.

[42] *Id.*

[43] 514 U.S. 938, 944 (1995).

FAA preempts state laws that place arbitration agreements under greater scrutiny than other contract terms.[44]

## III. The District Court Found the Parties Had Agreed To Arbitrate Their Dispute; After Taking Interlocutory Review, the Court of Appeals Reversed.

In the instant case, the district court reviewed the contract under state contract law and determined that an "arbitration agreement" existed.[45] The district court ordered the parties to arbitration, despite the fact that the agreement did not define all of the details with respect to the arbitration.

The court of appeals entertained Randolph's appeal, contrary to the weight of authority.[46] In addressing whether the parties had agreed to arbitrate their dispute, the court filled the contract's silence with the worst possible terms (from Randolph's perspective) and, with that reading, determined that the contract was unenforceable because it "fails to provide the

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[44] 517 U.S. 681, 685-87 (1996).

[45] *See Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1425-26 (M.D. Ala. 1997), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000).

[46] *See Randolph v. Green Tree Fin. Corp.-Ala.*, 178 F.3d 1149, 1154 (11th Cir. 1999); *see also Seacoast Motors v. Chrysler Corp.*, 143 F.3d 626, 628-29 (1st Cir.), *cert. denied*, 525 U.S. 965 (1998); *Napleton v. General Motors Corp.*,138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 525 U.S. 931 (1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994).

minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."[47]

## IV. Federal and State Courts Have Addressed Thousands of Similar Disputes Over the Validity of Agreements To Arbitrate in the Last Several Years.

Since this Court decided *Casarotto*[48] in 1996, the United States Courts of Appeals have decided 277 cases involving arbitration (including the case now before the court)[49] and the state appellate courts have decided 339 such cases.[50] Trial courts have been faced with thousands more. The procedural posture of those cases has been almost as varied as the number of cases.

The issue of interlocutory appeal in the instant case is only one of hundreds of review issues addressed, explicitly and implicitly, by these opinions. Many challenges have asserted state-law contract defenses in attempts to avoid an arbitration contract, as well as arguments that their claims are not subject

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[47] *Randolph*, 178 F.3d at 1158.

[48] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

[49] *See* Westlaw Keynote Search conducted on May 24, 2000; Keynote "33 Arbitration," Jurisdiction "All United States Circuit Courts of Appeal," Additional Terms "da(aft 5/20/1996)."

[50] *See* Westlaw Keynote Search conducted on May 24, 2000; Keynote "33 Arbitration," Jurisdiction "All States," Additional Terms "da(after 5/20/1996)."

to arbitration because of their very nature, such as is made with respect to TILA in this case.

When a challenge to an arbitration contract is raised, courts use a wide variety of procedures and apply similarly varying standards to resolve the arbitrability issue. Such inconsistent approaches foster costly and time-consuming litigation that, in turn, frustrates the purpose of the FAA and the agreements made thereunder. Parties must repeatedly raise multiple claims, because the effectiveness of each claim at any stage is unclear.

To give effect to the imprimatur Congress has given to arbitration, to ease the burdens on the courts below and to further the interests of justice, the Court should take this opportunity to standardize the pre-arbitration review process to be followed under the FAA and decisions of this Court.

## V. Under the FAA, Pre-Arbitration Judicial Review of Agreements to Arbitrate Should Be Narrowly Limited.

Although not at issue in this case, challenges to arbitration agreements commonly are made under state contract law, including such contract-law doctrines as unconscionability. Review of how pre-arbitration challenges under state contract law should be handled under the FAA illustrates the need for a uniform procedure for all such pre-arbitration judicial review of agreements to arbitrate.

### A. Consistent with the FAA, state-law contract challenges should be resolved expeditiously.

This Court has made it clear that only state-law challenges applying to any contract term will negate an otherwise complete

contract for arbitration.[51] Particularly with regard to the concepts of "unconscionability" and "lack of mutuality," lower courts have taken a variety of tacks in examining the relationship of these issues to the FAA. The most extensive examinations of these defenses by trial courts often include deposition and document discovery, resulting in pre-arbitration judicial proceedings of far greater magnitude than any arbitration of the merits that would have occurred under the contract.[52]

Section four of the FAA provides that the court should examine the "making of the agreement for arbitration" and "being satisfied that [it] is not in issue," shall order the parties "to proceed to arbitration."[53] Congress clearly contemplated that this would be a perfunctory examination. This Court has said that the question "call[s] for an expeditious and summary hearing, with only restricted inquiry into factual issues."[54]

The FAA goes on to provide that, only "if the making of the arbitration agreement . . . [is] in issue," shall the court proceed to a "trial" of that issue.[55] Under section four, the avoidance of the contract requires such a trial, unless the court

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[51] *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995).

[52] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 n.17 (1985) (describing the efficacy sought in arbitration).

[53] 9 U.S.C. § 4 (1994).

[54] *Moses H.Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

[55] 9 U.S.C. § 4 (1994).

can find, as a matter of law, that the agreement violates state-law contract standards.

To give effect to section four, the trial court in which the section-four motion is brought should review the arbitration agreement and the incorporated arbitration rules (if any) to identify terms that would violate applicable contract law. If none are apparent on the face of the documents, the court should order the parties to arbitration. This examination should be made with proper regard for the presumption of validity of any contract[56] and the strong presumption in favor of an agreement for arbitration.[57]

### B. The FAA provides for ample post-arbitration review after the facts of the arbitration have been fully developed.

Like other contracts, agreements for arbitration may not always expressly state all of the incidental terms of the agreement or foresee all possible details of the arbitration.[58] The instant case is an example. It is not possible to know exactly what all of the contract terms will mean, in practice, until the arbitration process is begun. The arbitrator may be fair

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[56] *See* 17A Am. Jur. 2d *Contracts* § 333; *see also* Restatement (Second) of Contracts § 203(a) (1979); *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977).

[57] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985).

[58] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989).

or biased; the cost may be low or high; fee-waiver provisions may or may not apply; the defending party may offer to pay all of the fees or not.

Sections 10 and 11 of the FAA provide ample remedies for most claims of arbitral unfairness.[59] Generally, parties to an arbitration should assert their challenges in the arbitration and avoid any return to court until the completion of the arbitration.[60] At that point, petitions for relief under those post-award sections are appropriate. This best preserves judicial resources and, more importantly, provides the district court with a complete record upon which to rule. Not incidentally, many arbitrations will be resolved favorably to a party with a potential procedural claim, obviating the necessity of court intervention on behalf of the claimant.

**C. If, after arbitration has been ordered, facts develop that warrant judicial resolution of a defense to the arbitration agreement before the arbitration has been completed, the parties should first be required to exhaust the arbitration-related options before returning to court.**

There may arise, in the course of the arbitration process, circumstances creating violations of generally applicable state contract law that a litigant would be unable to resolve by asserting the objection in arbitration and pursuing it in post-award procedures. Hypothetical examples would be a prohibitive cost of the arbitration process or the unavailability

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[59] *See* 9 U.S.C. §§ 10, 11 (1994).

[60] *See id.*

of an arbitrator. These issues would arise only after the court had ordered the parties to arbitration under section four of the FAA and after the claimant had filed the arbitration claim.

The failure of the selection process to produce a qualified arbitrator would not necessarily be apparent until the arbitration process has begun. The actions of the court upon failure of the arbitrator selection process "for any reason" are defined by the FAA.[61] Either party may petition the court for an alternative appointment.[62] If, for instance, the court determined that no unbiased arbitrator (or no arbitrator at all[63]) could be selected from the pool designated by the arbitration agreement, the court can appoint an alternative.[64]

Prior to assertion of the arbitration claim, allegations of prohibitively high costs would be completely speculative. Although the court could earlier examine the published arbitration fees, the actual application of fee payment, fee sharing and fee waivers to the particular claim could occur only after an arbitration claim was asserted.

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[61] *See* 9 U.S.C. § 5 (1994).

[62] *See id.*

[63] *See, e.g., Brown v. ITT Consumer Financial Corp.*, No. 99-10506, 2000 WL 556757 (11th Cir. May 5, 2000).

[64] This Court has made it clear that alleged "bias" of the arbitration administrator will not prevent an arbitration, so long as the agreement or incorporated rules provide, on their face, for an effective selection process. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

The United States Court of Appeals for the Eighth Circuit has addressed such circumstances internal to the arbitration process and has provided guidance for the trial courts and litigants in that circuit on how to handle these claims.[65] This Court should apply that process to all pre-arbitration challenges to an arbitration agreement. Litigants should be required to:

> First, make every reasonable effort to resolve the issue, without returning to the court;
>
> Second, exhaust the remedies for the alleged defect available within the arbitration structure; and
>
> Third, accept the offer of other parties to the contract to modify the contract or process to eliminate the alleged flaw.[66]

This escalating procedure will undoubtedly eliminate almost every asserted imperfection of any arbitration process. More importantly, it will prevent repeated petitions to the district courts and allow the courts to effectively review arbitration processes with a complete record. This Court should apply this process to all "intra-arbitration" challenges under the FAA.

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[65] *See Dobbins v. Hawk's Enterprises*, 198 F.3d 715, 717 (8th Cir. 1999).

[66] *See generally id.*

### D. The FAA provides dissatisfied parties with an opportunity for post-arbitration judicial review of an arbitration award.

Enforcement of any arbitration award requires confirmation of the award by a court.[67] Further, in adopting section 10 of the FAA, Congress provided for broad post-arbitration judicial review of arbitration decisions.[68] The range of review extends from even "evident" (not actual) partiality[69] to "any other misbehavior."[70] Of particular interest in the review of arbitration awards has been the review of the exercise of power by the arbitrator(s).

Section 10(a)(4) empowers the court to act "[w]here the arbitrators exceeded their powers."[71] Those powers are, of course, defined by the arbitration agreement of the parties and/or the submission to the arbitrators.[72] Where the parties have given the arbitrators broad powers, the review is limited.[73]

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[67] *See* 9 U.S.C. § 9 (1994).

[68] *Id.* § 10.

[69] *Id.* § 10(a)(2); *see also Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147-49 (1968).

[70] 9 U.S.C. § 10(a)(3) (1994).

[71] *Id.* § 10(a)(4).

[72] *See Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989).

[73] *See, e.g., United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[A]s long as the arbitrator is even arguably

But where the contract restricts the power of the arbitrators, requiring them to follow the law,[74] the court may review the arbitrators' decision for legal accuracy.[75]

This Court has also held that parties are to be afforded all of their substantive statutory rights in arbitration of statutory claims.[76] The "powers" of the arbitrators are, therefore, further restricted in arbitration of statutory claims.[77] The trial court may review an arbitration award resulting from a claim of statutory rights to determine if the arbitrators acted within those constraints on the arbitrator's powers.[78] In the case before the Court, for instance, after the arbitration is complete, a section 10 (a)(4) petition would permit the district court to determine if the arbitrator provided Respondent with her statutory rights under TILA.

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construing or applying the contract and *acting within the scope of his authority*, that a court is convinced he committed serious error does not suffice to overturn his decision." (emphasis added)).

[74] *See Forum Code*, *supra* note 3, Rule 20.

[75] *See Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Syncor Int'l. Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Stifel, Nicolaus & Co., Inc. v Francis*, 872 S.W. 2d 484 (Mo. Ct. App. 1994); *Faherty v. Faherty*, 477 A. 2d 1257 (N.J. 1984); *Metropolitan Waste Control Comm'n. v. City of Minnetonka*, 242 N.W. 2d 830 (Minn. 1976).

[76] *See Gilmer*, 500 U.S. at 26.

[77] *See id.*

[78] *See id.*

After the arbitration, when all of the relevant events have occurred and the record is before the court, the parties can present to the court facts and applicable legal argument, rather than speculation and innuendo. Moreover, many procedural claims will be obviated by the results of the arbitration. Courts will be required to address only real and necessary issues related to an actual arbitration and will have a record available for review.[79]

The FAA contemplates that the parties have wide latitude in defining the matters submitted to the arbitrators and limiting or expanding the powers of the arbitrators to act. Sections 10 and 11, in turn, provide the court with the power to modify, correct or vacate awards of the arbitrators.[80]

## CONCLUSION

The FAA provides parties with access to justice that is otherwise unavailable. To give effect to the goals of the FAA and to assure a fair arbitration process, the Court should establish the following review process:

First, trial courts should review the arbitration agreement and assess the incorporated rules to assure the terms meet minimum state contract law standards. If so, arbitration should be ordered.

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[79] For example, the Forum Code allows the parties to obtain both a record of the proceedings and a written reasoned award. *See Forum Code*, *supra* note 3, Rules 35F & 37G.

[80] *See* 9 U.S.C. §§ 10, 11 (1994).

Second, trial courts should require parties in the arbitration process before returning to court to (1) make every reasonable effort to resolve any issue, (2) exhaust all remedies within the arbitration process, and (3) accept the offer of other parties to modify the contract to eliminate the flaw.

Third, trial courts should exercise the review powers under Sections 10 and 11 of the FAA to assure that parties received every benefit for which they contracted.

Dated: June 8, 2000

David F. Herr
*Counsel of Record*
Michael C. McCarthy
MASLON EDELMAN
BORMAN & BRAND, LLP
3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 672-8200

Edward C. Anderson
National Arbitration Forum
500 Rosedale Tower
1700 West Highway 36
Saint Paul, Minnesota 55113
Telephone: (651) 631-1105

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IN THE
# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

ANN ELIZABETH REESMAN*
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Counsel for Amicus Curiae Equal Employment Advisory Council*

**Counsel of Record*

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IN THE

# Supreme Court of the United States

No. 99-1235

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of Petitioners before this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 325 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, and other equal employment statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship including statutory claims of discrimination.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration provides a fair, efficient, and effective means of resolving discrimination claims and other employment-related issues that otherwise would clog the courts. Because of its interest in this subject, EEAC has filed friend-of-the court briefs in numerous cases

supporting the enforceability of arbitration agreements, as well as many other important issues of employment law.[2]

Thus, the issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. While the case arose in the context of a commercial arbitration agreement, this Court's decision is likely to affect agreements to arbitrate employment-related claims as well. EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

## STATEMENT OF THE CASE

Respondent Larketta Randolph financed her purchase of a mobile home through Petitioner Green Tree Financial Corp. —Alabama, which is a wholly-owned subsidiary of Petitioner Green Tree Financial Corporation (hereinafter collectively "Green Tree."). Pet. App. 2a. Her retail installment contract with the seller of the mobile home, which names Green Tree as the assignee, provides for binding arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this Contract . . . ." Pet. App. 2a-3a.

Two years later, Randolph sued Green Tree, claiming (1) that the financing documents violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (TILA), because the required TILA disclosure statement did not state that she was required to obtain "vendor's single interest insurance," (2) that the documents violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, by requiring arbitration of disputes, and (3) that TILA precludes arbitration of TILA claims. Pet. App. 4a. Green Tree moved to compel arbitration and to stay

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[2] *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

or dismiss the action. *Id.* The district court granted the motion to compel and dismissed all of Randolph's claims with prejudice. Pet. App. 4a-5a. Randolph appealed, and Green Tree moved to dismiss the appeal for lack of jurisdiction. Pet. App. 5a.

The Eleventh Circuit heard the appeal and reversed the district court's ruling. First, the Court of Appeals concluded that it had jurisdiction, holding that the district court's order was an appealable "final decision" under § 16(a)(3) of the Federal Arbitration Act (FAA), 9 U.S.C. § 16(a)(3). Pet. App. 15a. Second, the Court of Appeals ruled that the arbitration agreement was unenforceable because it was silent as to the payment of arbitration fees and costs, making it possible that "Randolph might be required to bear substantial costs of the arbitration even if she were to prevail . . . ." Pet. App. 19a. This Court granted *certiorari.*

## SUMMARY OF ARGUMENT

The majority view, that an order compelling arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, is an appealable order only if it is issued in an "independent" proceeding, is the only logical approach. Under that view, the order in the instant case, which was "embedded" in a broader proceeding, was interlocutory and not appealable, so that the court below lacked jurisdiction to hear the appeal.

The court below further erred in concluding that an arbitration agreement that is "silent" on the allocation of fees and costs is unenforceable. First, the federal policy favoring arbitration requires that doubts be resolved in favor of enforcing the agreement, and the court below did just the opposite. Second, the court below mistakenly assumed that cost-sharing among the parties, at least initially, prevents complainants from being able to vindicate their statutory rights. This view is contrary to the opinions of three other circuit courts of appeals as well as a respected government

Commission, a multifactional task force that issued "due process" standards for employment arbitration, the primary national organizations supplying arbitrators, and others.

## ARGUMENT

### I. THE VIEW OF THE MAJORITY OF THE CIRCUIT COURTS OF APPEALS, THAT AN ORDER COMPELLING ARBITRATION IN AN "EMBEDDED" PROCEEDING IS INTERLOCUTORY AND NOT APPEALABLE, IS CORRECT AND SHOULD BE ADOPTED BY THIS COURT

As the court below acknowledged, a substantial majority of the circuit courts of appeals would have concluded that they lacked jurisdiction to hear the appeal in the instant case. By adopting the opposite view, the Court of Appeals placed itself in the minority and outside the realm of logic.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, was intended "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). The FAA "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985) (citations omitted).[3] The Act reflects a "'liberal federal

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[3] The key provision of the FAA is Section 2, which provides;

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an

policy favoring arbitration agreements' . . . guaranteeing the enforcement of private contractual arrangements . . . ." *Id.* at 625 (citations omitted). Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [this Court] rigorously enforce agreements to arbitrate.'" *Id.* at 625-26 (citation omitted).

First passed in 1925, the FAA was amended in 1988 to specify when an appeal can and cannot be taken from a district court order. Pub. L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15 (renumbered Pub. L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120, now 9 U.S.C. § 16). The statute now provides that:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting or vacating an award;

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agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999 & Supp. 2000).

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (1999 & Supp. 2000). The statute thus authorizes an appeal in cases in which the district court has disallowed arbitration, 9 U.S.C. § 16(a)(1) and (2), and denies an appeal where the district court has allowed the arbitration to proceed. 9 U.S.C. § 16(b).

As the court below observed, the courts of appeals are divided as to the meaning of § 16(a)(3) and what constitutes a "final decision" in this context. Indeed, the court below acknowledged the eight circuits that have ruled that § 16(a)(3) does not permit an appeal of an order compelling arbitration where the arbitration issue is "embedded" in a broader proceeding. In the view of these circuits, an appeal is authorized only if the order compelling arbitration is "independent" —that is, it stands alone as the sole issue in the case. Pet. App. 7a – 8a. Three circuits—the Sixth, the Tenth, and now the Eleventh—read § 16(a)(3) as permitting an appeal even in an "embedded" proceeding where the trial

judge has dismissed the case rather than merely granting a stay pending arbitration. Pet. App. 9a.

The majority view is more in keeping with the rest of § 16, since it allows arbitration to proceed without further delay where there are issues to be arbitrated. Moreover, the majority view provides a logical, systematic way of distinguishing which cases are appealable and which are not, in a way that furthers the federal policy favoring arbitration.

In contrast, the minority's approach effectively creates an anomaly that depends solely on how the district court characterizes the end of its current involvement in the case. If the district court dismisses the action, in the minority view the decision is "final" and therefore appealable, but if the court merely stays the action, it is not. Since in either case the district court has ruled in favor of arbitration, its disposition of the remainder of the case, which should not affect the next stage, in fact dictates how the case should proceed. This seems illogical.

Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3 and 4, are the logical comparators here. Section 3 provides for a court to stay a pending action if it is subject to arbitration. If the court refuses a stay, the order is immediately appealable under § 16 (a)(1)(A). If the court grants the stay, the order is not appealable, pursuant to § 16(b)(1). Similarly, Section 4 allows a party seeking to enforce an arbitration agreement to petition the district court for an order compelling arbitration. If arbitration is denied, the order is immediately appealable under § 16(a)(1)(B). If the petition is granted, however, the order is interlocutory and not appealable, pursuant to § 16(b)(2).

The entire thrust of the FAA is towards facilitating the parties' agreement to arbitrate their disputes. The common sense interpretation of § 16(a)(3), then, is to allow arbitration to proceed forthwith if there are merits issues for the

arbitrator to decide, and to allow an immediate appeal only if arbitration has been denied, or if the only issue anywhere near the table is whether or not to arbitrate, *e.g.* a declaratory judgment proceeding concluding that an arbitration agreement is valid and enforceable as to future disputes that have yet to arise. The Eleventh Circuit's decision to the contrary is illogical, given this Court's prior interpretations of the FAA, and should be reversed.

## II. AN ARBITRATION AGREEMENT NEED NOT ALLOCATE THE ARBITRATION COSTS TO BE ENFORCEABLE

The court below ruled that the arbitration agreement was unenforceable because it was silent as to the allocation of arbitration fees and costs. This conclusion directly contravenes the federal policy favoring arbitration and is unsupportable.

### A. The Federal Policy Favoring Arbitration Requires That Doubts Be Resolved in Favor of Enforcing an Agreement To Arbitrate

As this Court has recognized repeatedly, "[the FAA's] provisions manifest a 'liberal federal policy favoring arbitration agreements.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, " 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* at 26 (quoting *Moses H. Cone Mem'l Hosp.* at 24).

This Court's decision in *Gilmer*, holding that statutory discrimination claims may be subject to compulsory arbitration by agreement, made it clear that as a general rule, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to

preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Indeed, this Court unequivocally rejected Gilmer's general challenges to the arbitration process as an adequate means of vindicating statutory rights, even those under statutes "designed to advance important public policies." Quoting *Mitsubishi Motors*, this Court stated that "[s]o long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28 (*quoting Mitsubishi Motors*, 473 U.S. at 637).

The lesson of *Gilmer* and its antecedents is that if there is a way to enforce the agreement, the court should do so, resolving doubts in favor of arbitration. The U.S. Court of Appeals for the District of Columbia Circuit did exactly that in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). Despite its disapproval of the arbitration agreement's silence on the allocation of costs, the D.C. Circuit enforced the agreement. Having determined that "ambiguity in a contract should be resolved against the drafter—here, the employer—and ambiguity should be resolved in favor of a legal construction of the parties' agreement," *id.* at 1468, the D.C. Circuit concluded, "we interpret the arbitration agreement at issue as requiring Burns to pay all arbitrators' fees associated with the resolution of Cole's claims," *id*, and sent the case to arbitration.

The court below took the exact opposite approach. Rather than construing the agreement in a way that allowed it to be upheld, the court below resolved its doubts against arbitration. For this reason alone, the decision below must be reversed.

### B. It Is Common, and Appropriate, for an Arbitration Agreement To Permit or Require Cost-Sharing Among the Parties

In reaching its erroneous conclusion, the Court of Appeals started from the mistaken premise, shared by the D.C. Circuit in *Cole* and the Tenth Circuit in *Shankle v. B-G Maintenance Mgmt. Inc.*, 163 F.3d 1230 (10th Cir. 1999) (holding an employment arbitration agreement unenforceable because it required the employee to pay half of the arbitrator's fees), that requiring complainants to shoulder some of the arbitrator's fee somehow trammels their statutory rights. This view is at odds with the holdings of other courts, as well as with the prevailing wisdom of those who have studied arbitration systems.

For example, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), the First Circuit found the New York Stock Exchange's (NYSE) arbitration procedures adequate to resolve employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, despite the contention that "plaintiffs are charged forum fees, which may be as high as $3,000 per day and tens of thousands of dollars per case." 170 F.3d at 15. In the First Circuit's analysis (1) "[n]othing in the choice of arbitration mandates these outcomes, nor are such outcomes necessary concomitants of the NYSE arbitral system," *id.* (2) "it does not appear to be the usual situation that a plaintiff is asked to bear forum fees," *id.*, since "NYSE arbitrators possess discretion to award costs and fees when they decide a dispute," *id.* at 16; and (3) "if unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with [the underlying statute] could be presented by the employee to the reviewing court." *Id.* In other words, as the First Circuit explained, just because plaintiffs theoretically *could* be required to pay forum fees is no reason to believe that they ultimately *will*,

and thus is no reason to refuse to enforce the agreement. *See also Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir.) (applying *Rosenberg*), *cert. denied*, 120 S. Ct. 44 (1999); *Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752, 763 (5th Cir. 1999) (specifically disagreeing with *Cole* and *Shankle* and concluding that "*Gilmer* does not so clearly imply that no part of arbitral forum fees may ever be assessed against federal anti-discrimination claimants, although it plainly indicates that an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims"), *cert. denied*, 120 S. Ct. 1833 (2000).

Indeed, in the view of several respected authorities, an arbitration program should provide for the individual to pay part of the arbitrator's fee in order to meet basic requirements of fairness. The Commission on the Future of Worker-Management Relations, known as the "Dunlop Commission," concluded that the fairness and quality standards it prescribed for private arbitration mechanisms required that "[t]o ensure impartiality of the arbitrator, both the employee and the employer should contribute to the arbitrator's fee. Ideally, the employee contribution should be capped in proportion to the employee's pay, so as to avoid discouraging claims by lower-wage workers." Commission on the Future of Worker-Management Relations, U.S. Dept. of Labor and U.S. Dept. of Commerce, *Report and Recommendations* (December 1994) at 32. Perhaps even more significantly, the "Due Process Protocol" issued in 1995 by a multifactional task force representing dispute resolution organizations, plaintiffs, management, labor and government, identifies equal shares as the preferred approach:

> Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the

> arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties' share therein.

*A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Dispute Resolution Journal 37, 39 (Oct-Dec. 1995).[4]

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[4] Members of the Task Force and signatories to the Due Process Protocol were:

> Co-Chairs: Christopher A. Barreca, Partner, Paul, Hastings, Janofsky & Walker, Rep., Council of Labor & Employment Section, American Bar Association; Max Zimny, General Counsel, International Ladies' Garment Workers' Union Association, Rep., Council of Labor & Employment Section, American Bar Association; Arnold Zack, President, Nat. Academy of Arbitrators. Members: George H. Friedman, Senior Vice President, American Arbitration Association; Joseph Garrison, President, National Employment Lawyers Association; Michael F. Hoellering, General Counsel, American Arbitration Association; Charles F. Ipavec, Arbitrator, Neutral Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; Wilma Liebman, Special Assistant to the Director, Federal Mediation & Conciliation Service; Lewis Maltby, Director, Workplace Rights Project, American Civil Liberties Union; Robert D. Manning, Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Union Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; W. Bruce Newman, Rep., Society of Professionals in Dispute Resolution; Carl E. VerBeek, Partner, Varnum Riddering Schmidt & Howlett, Management Co-Chair, Arbitration Committee of Labor & Employment Section, ABA.

Dispute Resolution Journal (October-December 1995) at 39. Interestingly, the D.C. Circuit in *Cole v. Burns*, dismisses this diverse group as "[s]ome commentators" in rejecting their conclusion that fee-splitting is a benefit rather than a detriment. 105 F.3d at 1485 (D.C. Cir. 1997).

Likewise, the procedural rules of the two major private national organizations supplying arbitrators provide for an initial split of fees, subject to modification by the parties by agreement and ultimately subject to reallocation by the arbitrator in the award.[5] With respect to the filing fee, the current rules of the non-profit American Arbitration Association (AAA) applicable to the arbitration of employment discrimination claims state that "The filing fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award." American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (eff. January 1, 1999) at Rule 38.[6] The arbitrator's fees "shall be borne equally by the parties unless they agree otherwise, or unless the law provides otherwise." *Id.* at Rule 39. Ultimately, however, all "fees, expenses and compensation" including the arbitrator's fees are subject to assessment to "any party" by the arbitrator as part of the award. *Id.* at Rule 34. This point is repeated in the Administrative Fee Schedule accompanying the AAA Rules, which states that "Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award." Administrative Fee Schedule, American Arbitration Association, *National Rules*

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[5] While the National Academy of Arbitrators' "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems" do not specifically address the question of costs, it refers arbitrators to the "Due Process Protocol" for guidance on questions of due process. National Academy of Arbitrators, "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems" (May 21, 1997) at II.F.

[6] The current filing fee for a single-arbitrator case is $500 "unless the plan provides otherwise." Administrative Fee Schedule, American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (eff. January 1, 1999).

*for the Resolution of Employment Disputes* (eff. January 1, 1999).[7]

Similarly, the for-profit JAMS organization provides in its procedural rules for employment arbitration that "Each Party will pay its *pro-rata* share of JAMS fees and expenses . . . . unless the parties agree on a different allocation of fees and expenses." JAMS *Arbitration Rules and Procedures for Employment Disputes* at Rule 27(a).[8] While JAMS requires a pre-hearing deposit, it "may waive the deposit requirement upon a showing of good cause." *Id.* at Rule 27(b). JAMS takes the position that "[a]n employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration." JAMS *Policy on Employment Arbitration—Principles of Neutrality and Minimum Standards of Procedural Fairness* at § B, Standard No. 6.[9] At the same time, JAMS clarifies that "[a]s a general matter, the sharing of arbitration costs does not violate the Minimum Standards unless the arrangement effectively *precludes* access by the employee." *Id.* (emphasis added). Accordingly, while JAMS "encourages employers to bear all or most of the costs of arbitration", it also gives employers the responsibility to "assure the employee that the arbitrator's

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[7] Notably, as the dissent in *Cole v. Burns* pointed out, 105 F.3d at 1490, the identical language appears in the Administrative Fee Schedule accompanying the 1996 version of the AAA rules at issue, so that the majority erred in concluding that "the AAA hedged on this question." 105 F.3d at 1481.

[8] JAMS *Comprehensive Arbitration Rules and Procedures* applicable to commercial, real estate and construction cases contain similar language at Rule 30. http://www.jamsadr.com/comprehensive_arb_rules.asp.

[9] Similarly, JAMS *Minimum Standards of Procedural Fairness Policy on Financial Services Arbitrations* provide that "With respect to the cost of the arbitration, the procedure must allocate costs in a way that does not preclude access by the consumer to the procedures" at Rule 6. http://www.jamsadr.com/fin_minimum_stds.asp.

neutrality will not be affected by the fee arrangements" and requires the employer to "make clear that the employee has the *right* to contribute up to one-half of all administrative and arbitrator fees and expenses." *Id.* (emphasis added). JAMS, too, endorses the *Due Process Protocol. Id.* at § D.

Indeed, the federal government also has supported fee-sharing for employment arbitrations. When the U.S. Department of Labor proposed a pilot program to explore the use of alternative dispute resolution under the laws it enforces, it expressly supported fee-splitting and inquired whether any other option would even be a good idea:

> The Department believes that requiring the parties to share the fees and expenses of the mediator or arbitrator helps ensure impartiality. In cases in which the Department is a party or a participant, DOL generally expects that it would pay one-half of the mediator or arbitrator's fees and expenses. The Department invites comment on whether permitting the negotiation of a different arrangement is advisable. To reduce the possibility of bias based on disparate contributions, payment would be forwarded to the mediator or arbitrator by the sponsor of the roster (or by the Department, when it is not a party or participant), without disclosing the parties' respective shares.

Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor, 62 Fed. Reg. 6690, 6694 (February 12, 1997).

Not surprisingly, then, both reports by the U.S. General Accounting Office (GAO) on the degree of use of alternative dispute resolution in private employment observe that cost-sharing is the norm. In preparing a 1995 report to Congress based on a random sample of 2,000 private sector employers, the GAO followed up with companies that reported using arbitration, and compared those companies' policies to the quality standards identified by the Dunlop Commission.

*Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, United States General Accounting Office, GAO/HEHS-95-150 (July 1995) at 2-3. The GAO reported that, of the nineteen policies reviewed that addressed costs, fifteen provided for some contribution by the employee:

> To ensure impartiality of the arbitrator, the Commission proposes that both the employee and the employer contribute to the arbitrator's fee. Ideally, the employee contribution should be capped in proportion to the employee's salary to avoid discouraging claims by low-wage workers.
>
> Seven policies do not address cost sharing. In four policies, the employer pays for all arbitration costs; costs are to be shared equally in nine policies; and the employee share is either capped or limited to less than half the costs in the remaining six policies. For example, one employer pays all costs in excess of $50. Another firm pays 80 percent of the arbitration costs, while the employee is responsible for 20 percent.

*Id.* at 14.

Two years later, the GAO profiled the alternative dispute resolution programs of five private sector employers, as well as those of six federal agencies. *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace*, United States General Accounting Office, GAO/GGD-97-157 (August 1997). The GAO reported that *all five* of the companies it studied "required their employees to share in the costs of arbitration." *Id.* at 24. One requires only a $50 processing fee, *id.* at 38, one requires an employee contribution of $100 towards expenses, which is refunded if the employee prevails, *id.* at 46-47, one provides for equal shares but will cap the cost at two weeks net pay in cases of hardship, *id.* at 43, one divides costs equally but allows the arbitrator to make the final allocation, *id.* at 49-50, and one

pays all costs if the employee prevails and shares costs equally if the employee does not, but caps the employee's share at two days' base pay. *Id.* at 53-54.

The D.C. Circuit in *Cole* scoffed at the concern that payment of the arbitrator's fee by the employer would compromise the neutrality of the process. 105 F.3d at 1485. The concern is not necessarily that all arbitrators are potentially unethical and bound to rule in the direction of their paychecks, although such an outcome is conceivable. On the contrary, however, the relevant concern may be the far likelier occurrence that an employee will *perceive* the process as biased if the employer pays the "judge." *See* Russell Evans, *Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in Employment Contracts Survive a "Fairness" Analysis*, 50 Hastings L.J. 635, 665 (March 1999) (noting that "the perception of arbitrator partiality could arise where the employer alone pays all arbitration costs and fees").

As a practical matter, any party who knows that the arbitrator is being paid entirely by the other side cannot help but question whether he or she is getting a fair hearing. Where the rights involve statutory claims of employment discrimination, for example, the employee undoubtedly will view the entire process, from inception to outcome, as dominated and controlled by the employer who from the beginning is footing the bills. This explains, for example, positions such as that of JAMS, which requires that the employee be *permitted* to pay his or her fair share of the costs if so inclined. So, too, the Department of Labor's inquiry whether allowing the parties to negotiate some payment scheme *other than* fifty-fifty would ever be advisable.

The success or failure of an employer's internal arbitration program is dependent in large part upon both parties' faith in the fairness and neutrality of the process. For this reason, it makes far more sense to provide for each party to be

responsible at the outset for some of the cost, subject to a final allocation by the arbitrator in the award. Only in this way can each party feel that he or she is an equal participant in a neutral forum.

The availability of judicial review then serves as a safeguard against the imposition of unreasonable fees, as the First Circuit pointed out in *Rosenberg*. 170 F.3d at 16. *See also Koveleskie*, 167 F.3d at 366. This Court already has concluded that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (quoted in *Gilmer*, 500 U.S. at 32 n.4).

Given the prevailing wisdom that each party to an arbitration agreement can reasonably be expected to bear some of the cost, the court below erred in concluding that an arbitration clause that does not allocate fees is unenforceable.

## CONCLUSION

For the reasons set forth above, the *amicus curiae* EEAC respectfully submits that the decision below should be reversed.

Respectfully submitted,

ANN ELIZABETH REESMAN*
MCGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Counsel for Amicus Curiae Equal Employment Advisory Council*

* *Counsel of Record*

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IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF AMICUS CURIAE OF THE AMERICAN ARBITRATION ASSOCIATION

JOHN M. TOWNSEND
DANIEL WOLF
HUGHES HUBBARD & REED LLP
Washington, D.C.

JAMES H. CARTER
Chairman,
Arbitration Law Committee

FLORENCE PETERSON
*Counsel of Record*
General Counsel
AMERICAN ARBITRATION ASSOCIATION
335 Madison Avenue
New York, New York 10017-4605
(212) 716-3923

*Attorneys for Amicus Curiae The American Arbitration Association*

June 8, 2000

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*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF AMICUS CURIAE OF THE AMERICAN ARBITRATION ASSOCIATION

This brief is respectfully submitted by *amicus curiae* the American Arbitration Association ("AAA"), not in support of either party, but to urge reversal of the decision below on the second question presented. *Amicus curiae* AAA takes no position on the first question presented. Both Petitioners and Respondent have consented to the filing of this brief.[1]

[1] As required by Rule 37.6, *amicus curiae* AAA states that this brief was authored on its behalf by the counsel identified on the cover and the signature page, and that no one other than the AAA and its counsel made a monetary contribution to the preparation or submission of this brief.

## INTEREST OF AMICUS CURIAE

*Amicus curiae* AAA is a not-for-profit, public service organization, which offers a broad range of dispute resolution services through more than 35 offices in cities throughout the United States and cooperative agreements with arbitral institutions in 39 countries around the world. While such services include providing for mediation and other forms of alternative dispute resolution, the service most in demand from the AAA is the administration of arbitration proceedings. In addition, the AAA educates the public and potential users about various forms of dispute resolution and trains neutrals to act as arbitrators and mediators.[2]

The AAA is the largest provider of dispute resolution services in the world. From the time it was founded in 1926, the year after the enactment of the Federal Arbitration Act, through the end of 1999, the AAA has administered 1,693,431 cases, most of them arbitrations. Of those cases, 448,723 were filed in the last five years alone. These arbitrations ranged from major commercial disputes involving millions of dollars to uninsured motorist claims administered under state "no-fault" laws involving claims of a few hundred dollars. The AAA's experience in administering arbitration covers domestic and international claims, disputes arising out of collective bargaining agreements and private employment-related matters, disputes arising in insurance, construction, and other industries with specialized arbitration rules, and thousands of claims by individuals administered by the AAA's mass claims center. It also includes the administration of many disputes involving claims for less than $10,000 brought by individuals and businesses alike.

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[2] The AAA also promotes ethical standards for dispute resolution. The AAA was instrumental in establishing the Code of Ethics for Arbitrators in Commercial Disputes (with the American Bar Association) in 1977, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes in 1985, and the Model Standards of Conduct for Mediators in 1995.

Because the AAA is so heavily involved in the administration of arbitration as well as in education and training, it has a substantial interest in the Court's resolution of the second question presented by the Petition: Whether an arbitration provision that is silent on how the costs of arbitration are to be paid is unenforceable, in spite of the mandate of the Federal Arbitration Act, because a plaintiff asserting claims under other federal statutes designed to protect borrowers might be required to bear those costs.

The issue now before the Court is not new to the AAA. In 1997, in response to the increasing popularity of arbitration as a means of resolving disputes between businesses and consumers, the AAA convened a National Consumer Disputes Advisory Committee to examine concerns that had been expressed about the arbitration of such disputes and to devise guidelines for handling them that would be acceptable to consumer advocates as well as to businesses that deal with large numbers of consumers.[3] The Advisory Committee included persons affiliated with consumer groups, such as Consumers Union and the American Association of Retired Persons, state government consumer-protection professionals, representatives of businesses that deal directly with consumers, academics, and dispute resolution professionals. The Advisory Committee's mission was:

> "To bring together a broad, diverse, representative national advisory committee to advise the American Arbitration Association in the development of standards and procedures for the equitable resolution of consumer disputes." (App. A, *infra,* 8a.)

The result of the work of the Advisory Committee was the publication on April 17, 1998 of *A Due Process Protocol for the*

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[3] We use the term "consumer" in this brief to refer to natural persons and not to business entities that may play the role of consumer in certain of their transactions.

*Mediation and Arbitration of Consumer Disputes* (the "Consumer Due Process Protocol," a copy of which is appended to this brief as Appendix A). The Protocol stresses the importance of a fundamentally fair process, access to information, independence and impartiality of both the arbitrator and the administering organization, availability of a full range of remedies, a reasonable location for the hearing, and reasonable time limits. Most relevant to the case before the Court, the Protocol's Principle 6 addresses the question of cost, and states:

> "**Reasonable Cost**. Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process." (Principle 6, App. A, *infra,* 3a.)

The Protocol also stated that "Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction." (Principle 5, App. A, *infra,* 3a.)

Subsequently, the AAA adopted a set of arbitration rules specifically tailored to consumer disputes and the principles of the Consumer Due Process Protocol, which were issued on July 1, 1999 and amended on April 1, 2000 as the AAA's *Arbitration Rules for the Resolution of Consumer-Related Disputes* (the "Consumer Arbitration Rules," a copy of which is appended to this brief as Appendix B). The AAA has decided, as a matter of internal policy, that all consumer disputes to be administered by the AAA involving claims for less than $10,000 will be processed under the Consumer Arbitration Rules, regardless of the rules, terms and conditions reflected in a pre-dispute clause.

The AAA's interest in the Court's resolution of the second question presented is thus informed by substantial consideration of and experience with the arbitration of consumer claims and of

claims under statutes designed to protect the rights of consumers. The AAA hopes that the views presented on the basis of that consideration and experience will be of assistance to the Court. The AAA has previously filed amicus curiae briefs with the Court in: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); and *UBC Southern Council of Industrial Workers v. Bruce Hardwood Floors*, 522 U.S. 928 (1997).

## SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit appears to assume that arbitration is somehow second class justice, or at least that it imposes substantially greater hardships on litigants than those they face when they pursue litigation in a judicial forum. It is the position and experience of the AAA, however, that justice is not diminished in properly conducted arbitration proceedings. Rather, arbitration can enhance the fair and expeditious resolution of disputes.

The Court has emphasized for nearly twenty years that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (2000), declares a national policy favoring the arbitration of disputes. Consistent with this policy, the Court has enforced agreements to arbitrate a wide variety of claims, including statutory claims involving individuals. By arbitrating such claims, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628. While the Eleventh Circuit recognized the "strong federal policy favoring arbitration," (Pet. App. 15a), it nevertheless declined to enforce the arbitration clause before it out of concern that Respondent

would be unable effectively to vindicate her statutory rights under that clause. (Pet. App. 15a-18a.) The court's concern was well founded, but its solution was not.

The Eleventh Circuit's concern centered on the silence of the arbitration clause on the subject of how the costs of arbitration were to be paid. The court concluded that the consumer's "ability to vindicate her statutory rights" could "be undone by steep filing fees, steep arbitrators' fees or other high costs of arbitration." (Pet. App. 18a.) High filing and arbitrator fees can certainly present a problem in cases involving relatively small claims. That is why the AAA's Consumer Arbitration Rules require no filing fee from the consumer and limit the consumer's share of the arbitrator's fees to $125. But the Eleventh Circuit's concerns must be considered in the light of the mandate of the Federal Arbitration Act that an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Eleventh Circuit was not required to invalidate the arbitration clause in order to protect Respondent's ability to vindicate her statutory rights.

The preferable course, in view of the federal policy favoring arbitration, would have been for the Eleventh Circuit to apply the rule of contract law that a construction that makes an agreement unlawful should be avoided whenever possible in favor of one that makes it lawful. Following that rule, the Eleventh Circuit should have treated the clause's silence as to costs as an ambiguity. It could then have resolved that ambiguity to allow Respondent to vindicate her statutory rights through arbitration, by placing the burden of paying some or all of the arbitrator's fees and costs on Petitioners. That construction would have given the agreement to arbitrate the deference required by the Federal Arbitration Act.

## ARGUMENT

### I. THE ELEVENTH CIRCUIT GAVE INSUFFICIENT WEIGHT TO THE NATIONAL POLICY FAVORING THE ENFORCEMENT OF ARBITRAL AGREEMENTS

Congress enacted the Federal Arbitration Act in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). *See also Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Mitsubishi Motors Corp.*, 473 U.S. at 625; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The Federal Arbitration Act "declared a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The core expression of this policy is Section 2 of the Act, its "primary substantive provision." *Gilmer*, 500 U.S. at 24. That section provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The decision of the Eleventh Circuit not to enforce the arbitration clause at issue here gave insufficient weight both to that national policy and to the mandate of Section 2 of the Federal Arbitration Act.

#### A. Agreements To Arbitrate Statutory Claims Fall Within The National Policy Favoring Arbitration

The federal policy favoring arbitration is now clearly understood to apply to agreements to arbitrate statutory claims. *See, e.g., Gilmer*, 500 U.S. at 26; *Mitsubishi Motors*, 473 U.S. at

627. Pursuant to that policy, the Court has enforced agreements to arbitrate many types of claims by individuals, including claims arising under the federal securities laws, *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477 (1989), the Racketeering Influenced and Corrupt Organizations (RICO) Act, *McMahon,* 482 U.S. at 220, and the Age Discrimination in Employment Act. *Gilmer,* 500 U.S. at 20. To be sure, Congress may choose to write a statute that creates a cause of action that must be heard in court, but the Court has placed the burden on the party opposing arbitration to show that Congress intended to preclude waiver of the judicial forum. *See Gilmer,* 500 U.S. at 26; *McMahon,* 482 U.S. at 227.

The Court has emphasized that arbitration is simply a procedural option that does not take away the substantive rights of the parties under a statute:

> "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors,* 473 U.S. at 628.

*Accord Gilmer,* 500 U.S. at 26.

### B. There Is No Reason To Depart From The National Policy Favoring Arbitration When Disputes Involve Small Claims

The federal policy favoring arbitration has had the effect of encouraging the use of arbitration. The annual case load figures of the AAA for the last five years reflect the increasing acceptance and use of arbitration and other alternative means of dispute resolution:

| | |
|---|---|
| 1999 | 62,423 |
| 1999 | 72,200 |
| 1999 | 78,769 |
| 1999 | 95,143 |
| 1999 | 140,188 |

These figures bear witness to a dramatic surge in the popularity of arbitration as a means of resolving disputes in the United States. Pre-dispute arbitration clauses are now included in tens of thousands of contracts of all kinds. No single factor appears to the AAA to account for this trend, but some of the elements contributing to the popularity of arbitration that the AAA has identified are:

1. The consistency of U.S. courts in enforcing the national policy favoring arbitration, especially since the series of decisions (culminating in *Rodriguez de Quijas,* 490 U.S. at 484) overruling *Wilko v. Swan,* 346 U.S. 427 (1953), which has given the process increased predictability and reliability;[4]

2. The sheer number of arbitrations, which has given large numbers of users first-hand experience of the benefits of a process that is generally faster and less expensive than litigation, before an unbiased decision maker that they help to select;

3. The increasing criminal caseload of the federal courts, resulting from legislative additions to their jurisdiction, which has made resolving civil disputes in those courts a more time-consuming process;

4. The increase in the number of trained and experienced arbitrators available, which is in part the result of the

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[4] *See* J. Clark Kelso & Thomas J. Stipanowich, *Protecting Consumers in Arbitration*, Dispute Resolution Magazine at 11 (Fall 1998) ("Among private conflict resolution mechanisms, binding arbitration enjoys preeminent status as a result of robust judicial encouragement.").

large number of disputes that have gone to arbitration, and in part the result of the increased emphasis on professional training for arbitrators, which is required by the AAA; and

5. The globalization of commercial transactions, which has increased the demand for a neutral forum for resolving international disputes.

Nor is the demand for arbitration limited to parties involved in major commercial transactions and collective bargaining agreements. Over the years, many of the cases administered by the AAA have involved relatively small claims. Historically, the AAA has not kept data that would distinguish business claims from individual claims. But the records of the AAA show that 2,032 claims for amounts under $10,000 were filed in 1998, and 1,937 claims under $10,000 were filed in 1999. In addition, of the total of 140,188 arbitrations administered by the AAA in 1999, 51,622 involved claims arising out of automobile collisions under state "no-fault" statutes, which were conducted pursuant to procedures similar to those recommended by the Consumer Due Process Protocol. Almost 50,000 of the remaining cases in the AAA's 1999 caseload represent the AAA's involvement in a process mandated by the negotiated settlement of a nationwide class action against a major insurance carrier. Again, many of these cases involved relatively small individual claims.

The AAA would not have been entrusted with the administration of 100,000 claims of individual citizens if those involved—the court overseeing the class action settlement and the state insurance officials responsible for administration of no-fault laws—had not had confidence that arbitration, at least as administered by the AAA with safeguards for a fair process, would provide an appropriate procedure for resolving such claims.

## II. THE ELEVENTH CIRCUIT CORRECTLY IDENTIFIED REASONS FOR CONCERN ABOUT THE ARBITRATION CLAUSE BEFORE THE COURT

### A. Most Of The Shortcomings Of The Arbitration Clause Do Not Affect Its Enforceability

Agreements to arbitrate are to be enforced, whether they were entered into before or after the dispute, absent circumstances, such as fraud, duress, or unconscionability, that would result in the revocation of any contract.[5] *Mitsubishi Motors,* 473 U.S. at 627; *Gilmer,* 500 U.S. at 33. And courts have not been reluctant to police arbitration agreements under that standard. *See, e.g., Hooters of America, Inc. v. Phillips,* 173 F.3d 933, 938 (4th Cir. 1999) (rescinding arbitration agreement where employer "promulgat[ed] rules so egregiously unfair as to constitute a complete default of its contractual obligation"). No such circumstances are alleged here.

This is not to say that some concern about the arbitration agreement at issue in this case is not well placed.[6] For example,

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[5] The Court has stated that claims "of unequal bargaining power [are] best left for resolution in specific cases." *Gilmer,* 500 U.S. at 33.

[6] The clause reads, in pertinent part: "ARBITRATION: All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR

the clause fails to specify the rules to be applied, the place of arbitration, or (failing designation of a set of rules that would do so) how the expenses of the arbitration are to be paid. It also allows the "Assignee" to select the arbitrator, albeit with the consent of the "Buyer." (Pet. App. 3a.) But these are all deficiencies that may be supplied by subsequent agreement of the parties or, in the absence of such agreement, by the arbitrator once appointed or by a supervising court.[7] *See Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 711, 716 (7th Cir. 1987) (holding that arbitration provision which stated only that "disputes under this transaction shall be arbitrated" was not too vague to be enforced, because the court was able to supply "such implementing details as who the arbitrators would be, where arbitration would take place, and what procedures would govern").

Some consumer advocates would also criticize the arbitration clause before the Court on the grounds that it is a pre-dispute clause contained in a consumer contract.[8] Putting aside the

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PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract ... [including] money damages, declaratory relief, and injunctive relief." (Pet. App. 3a.)

[7] Any unfairness in the arbitrator selection provision may be cured by a court, because the clause gives the consumer the right to block the Assignee's selection, and Section 5 of the Federal Arbitration Act would then allow either party to ask a court to appoint the arbitrator. 9 U.S.C. § 5 (2000).

[8] Consumer advocates do not uniformly share this view. *See, e.g.*, Carol Haas, THE CONSUMER REPORTS LAW BOOK at 304 (1994) (recommending that consumers "insist on inserting a future-dispute arbitration clause" in contracts, using the standard AAA clause as an example, because such a clause may enable them "to avoid the high costs of litigation to resolve a contract dispute").

cases entrusted to the AAA by courts or state agencies, the AAA estimates that 90 to 95% of the arbitrations brought to the AAA are submitted to arbitration pursuant to clauses in agreements (most of which are *not* with consumers) entered into before the dispute arises. This is hardly surprising, because arbitration is a creature of agreement. And the AAA can state with assurance based on many years of experience that agreement on any subject is very difficult for parties to reach after a dispute has arisen.

The National Consumer Disputes Advisory Committee, which prepared the Consumer Due Process Protocol, was divided on the question of whether pre-dispute agreements to arbitrate were suitable for transactions between individuals and businesses.[9] Some commentators feel strongly that such agreements are not appropriate, on the basis of such concerns as the reasonable expectations of consumers and relative bargaining power.[10] Others believe that pre-dispute clauses offer "the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy."[11] While appreciating the sincerity of the policy concerns expressed on both sides of the question, the AAA submits that the Federal Arbitra-

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[9] Five principles (Principles 11-15, App. A, *infra*, 4a-6a) were nevertheless included in the Consumer Due Process Protocol "specially to protect consumers in the context of binding arbitration clauses." Kelso & Stipanowich, *supra*, at 12.

[10] *E.g.*, Jean R. Sternlight, *Drafting A "Bulletproof" Consumer Arbitration Agreement: Is It Possible?*, in ARBITRATION OF FINANCIAL SERVICES DISPUTES (PLI 1999); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?* 40 Ariz. L. Rev. 1069 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (Fall 1996).

[11] Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1349 (1997).

tion Act requires arbitration clauses whether pre- or post-dispute, to be judged and enforced by the same standards as limitations of warranty, terms of payment, or any other contractual provision. *See, e.g., Allied-Bruce Terminix Cos.*, 513 U.S. 265, 281 (1995) (noting that the FAA makes unlawful any attempt by a state to "place arbitration clauses on an unequal 'footing'" in context of a case involving a pre-dispute arbitration clause in a consumer contract to provide termite protection); *Hooters*, 173 F.3d at 937 ("Predispute agreements to arbitrate Title VII claims are thus valid and enforceable."); *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999) (stating that "we examine arbitration agreements in the same light as any other contractual agreement").

In supporting enforcement of pre-dispute arbitration clauses, subject to appropriate procedural safeguards, the AAA is influenced by the success of another protocol that was drafted under its auspices following the Court's decision in *Gilmer*. The Due Process Protocol for Statutory Disputes Arising out of the Employment Relationship was adopted in May 1995 on the recommendation of a group composed of employment attorneys, representatives of labor and management, and dispute resolution professionals.[12] The widespread adoption of programs conforming to the safeguards established by that Protocol has made available to millions of workers a range of dispute resolution options—from informal processes such as peer review, through mediation, to binding arbitration—that offer "systematic advantages over lawsuits for both workers and their employers." Estreicher, *supra*, at 1351. Indeed, a recent article by the former Director of the ACLU's National Task Force on Civil Liberties in the Workplace examined the results of AAA employment arbitration decisions for the period 1993-1995, just prior to the adoption of the Employment Due Process Protocol, and con-

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[12] The text of the Employment Protocol may be found on the AAA's website, www.adr.org, under Focus Areas - Employment.

cluded that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." Lewis Maltby, *Employment Arbitration—Is it really second class justice?*, Dispute Resolution Magazine at 24 (Fall 1999).

### B. The Concerns Expressed By The Eleventh Circuit Go To The Purposes Of The Statutes That Create The Cause Of Action

While noting some of the deficiencies just described, the Eleventh Circuit focused on shortcomings in the arbitration clause that seemed to it to implicate the compatibility of that clause with the purposes of the statutes under which Respondent's claims were brought. The Eleventh Circuit singled out one concern, the clause's silence on who is to pay the costs of arbitration, as so inconsistent with the purposes of those statutes that it justified a refusal to enforce the arbitration clause:

> "* * * the arbitration clause in this case is unenforceable, because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." (Pet. App. 18a.)

The Eleventh Circuit contrasted the clause before it to "the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs." (Pet. App. 17a.) As the Eleventh Circuit recognized, however, the arbitration clause "says *nothing* about the payment of filing fees or other apportionment of the costs of arbitration." (Pet. App. 17a) (emphasis added). Nor does the clause contain any provision with respect to financial hardship.

High filing and arbitrator fees present a genuine reason for concern if consumers are required to pay them. With that concern in mind, the AAA's Consumer Arbitration Rules require no

filing fee; a claimant is asked to pay only $125 as the claimant's share of the fees of the arbitrator, with all other fees and costs paid by the business party.[13] (App. B, *infra*, 21a.) In larger cases, such as those administered by the AAA under its Commercial Arbitration Rules, the claimant pays a filing fee, and costs are normally shared equally during the life of the proceeding. Fees and costs may then be apportioned by the arbitrator in the award.[14] The AAA's experience indicates that arbitrators reallocate the costs of arbitration in a majority of the commercial cases that proceed to award. A claimant with a meritorious claim thus has a statistically significant likelihood of recovering at least a portion of any costs he or she is required to advance under the Commercial Arbitration Rules.

The absence in the arbitration clause of any provision for waiver of fees and costs on the basis of hardship is also a fair reason for concern. The AAA, for example, has administrative procedures that allow deferrals or reductions in the AAA's administrative fees where extreme hardship on the part of a party makes paying or advancing some or all of such fees inappropriate. The AAA receives one or two requests each week for a waiver or deferral of administrative fees on the basis of economic hardship. When the hardship is substantiated, these requests are liberally granted.

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[13] A filing fee of $150 is required to file a case in federal court. *See* 28 U.S.C. § 1914(a) (2000).

[14] Rule R-45(c) of the AAA's Commercial Arbitration Rules permits the arbitrator to assess in the award (that is, to allocate among the parties) filing and other administrative fees, expenses, and the arbitrator's compensation "in such amounts as the arbitrator determines is appropriate." Those rules are available as part of the AAA's Commercial Dispute Resolution Procedures on the AAA's website, www.adr.org.

## III. THE ELEVENTH CIRCUIT SHOULD HAVE TREATED THE SILENCE OF THE ARBITRATION CLAUSE ON COSTS AS AN AMBIGUITY TO BE CONSTRUED SO AS TO PRESERVE THE ENFORCEABILITY OF THE AGREEMENT TO ARBITRATE

While the Eleventh Circuit's concern about the silence of the arbitration clause regarding the allocation of costs was well founded, its refusal to enforce the arbitration agreement on that basis was not. Section 2 of the Federal Arbitration Act requires that an arbitration agreement be enforced, absent such grounds "as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. No such grounds were found here. Rather, the Eleventh Circuit refused to enforce the arbitration agreement because that clause lacked any provision for shifting the cost of arbitration from the consumer to the business party. Without such a provision, the Eleventh Circuit felt, enforcement of the arbitration clause pursuant to the Federal Arbitration Act would be inconsistent with the purposes underlying the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (2000) ("TILA"), and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2000) ("Equal Credit Act"). (Pet. App. 18a.)

TILA gives consumers a remedy "designed to compensate borrowers for injuries caused by misleading disclosures and to deter lenders from making misleading disclosures." *Williams v. Public Fin. Corp.*, 598 F.2d 349, 355 (5th Cir. 1979). The "broad remedial provision" of the Equal Credit Act is intended to ensure "that creditors not affirmatively benefit from proscribed acts of credit discrimination." *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 33 (3d Cir. 1995). Recognizing that the actual out-of-pocket losses likely to be suffered would generally be too small to justify the bringing of a civil action, TILA permits an aggrieved consumer to recover

civil penalties, attorneys fees, and court costs. *See* 15 U.S.C. § 1640(a). The Equal Credit Act similarly allows an aggrieved credit applicant to recover punitive damages, attorney fees, and court costs in addition to actual damages. *See* 15 U.S.C. § 1691e. But nothing in the text or history of either act cited by either party in seeking or opposing the grant of a writ of *certiorari* demonstrates an intent on the part of Congress to restrict the availability of those remedies to cases filed in court.[15]

The Eleventh Circuit correctly looked to the purposes of TILA and the Equal Credit Act in considering the effect of the arbitration clause before it. But it neglected in doing so to construe that provision in a manner that would preserve the validity and enforceability of the agreement to arbitrate. As this Court has made clear:

> "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration * * *. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

*Accord Mitsubishi Motors*, 473 U.S. at 626 (same). When construing an agreement to arbitrate, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors*, 473 U.S. at 626; *accord Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

There is nothing inherent in the nature of arbitration that would prevent a litigant under TILA or the Equal Credit Act

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[15] The AAA's Consumer Arbitration Rules provide that "The arbitrator may grant any remedy or relief that the parties could have received in court." (Rule 13, App. B, *infra*, 20a.)

from effectively "vindicat[ing his or her] statutory cause of action in the arbitral forum." *See Mitsubishi Motors,* 473 U.S. at 637; *Gilmer,* 500 U.S. at 28. As the Court suggested in *Rodriguez de Quijas*, general attacks on the adequacy of arbitration procedures that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 490 U.S. at 481; *accord Gilmer,* 500 U.S. at 25. An agreement to arbitrate a statutory claim should thus be enforced unless something specific in its terms would prevent a party from effectively vindicating his or her rights under that statute.

The District of Columbia Circuit resolved a similar concern in favor of arbitration in the context of an agreement to arbitrate claims under Title VII of the Civil Rights Act. *Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465 (D.C. Cir. 1997). In that case, as in this one, it was "unclear * * * whether an arbitrator's fees (as distinguished from 'administrative fees') are to be paid by the employee alone, the employer alone, or by the parties together." *Id.* at 1481. The court found that, under Title VII, "employees cannot be *required* to pay for the services of a 'judge' in order to pursue their statutory rights." *Id.* at 1468 (emphasis in original). Faced with this proscription of the statute under which the claim was made, and the ambiguity created by the silence of the arbitration clause on the subject of paying for the fees of the arbitrator, the District of Columbia Circuit decided to "interpret the arbitration agreement * * * as requiring [the employer] to pay all arbitrators' fees," and enforced the arbitration agreement as so interpreted. *Id.* at 1486; *accord McWilliams v. Logicon, Inc.*, 1997 U.S. Dist. LEXIS 9822, at *5 (D. Kan. June 3, 1997) (finding the D.C. Circuit's "opinion in *Cole* both instructive and persuasive" and "adopt[ing] its fee allocation analysis in full").

The same option was open to the Eleventh Circuit. Rather than construing the arbitration clause's silence on fees and costs to conflict with the remedial and deterrent purposes of TILA and the Equal Credit Act, the Eleventh Circuit should have treated the silence as an ambiguity. Consistent with the national policy favoring arbitration and the principle that a construction that would make an agreement unlawful should be avoided when possible, the Eleventh Circuit should have resolved that ambiguity in a manner that would have enabled Respondent to vindicate her statutory rights in the agreed forum.[16] *See, e.g., Cole,* 105 F.3d at 1485 ("where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful"); *Paladino v. Arnet Computer Technologies, Inc.,* 134 F.3d 1054, 1058 (11th Cir. 1998); Restatement (Second) of Contracts § 203(a) (1981). Those rights would be vindicated by a construction of the arbitration agreement that would shift enough of the burden of paying arbitral fees and costs to Petitioner to assure that Respondent's "ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." (Pet. App. 18a.)[17] Alternatively, to the extent the Eleventh Circuit was concerned that an arbitrator might issue an order imposing costs on Respondent that would be "prohibitive" in relation to the sum at issue (Pet. App. 18a), it could have directed the district court to condition its order compelling arbitration on Petitioner's agreement to bear such costs.

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[16] Normal rules of construction also permit a court to construe ambiguous language against the interest of the party that drafted it. *See Mastrobuono,* 514 U.S. at 64 (construing ambiguous provision in arbitration agreement relating to authority of arbitrator to award punitive damages against the drafter); Restatement (Second) of Contracts § 206 (1981).

[17] Where the bargain of the parties is "sufficiently defined to be a contract," but omits "a term which is essential to a determination of their rights and duties," a court has the authority to supply "a term which is reasonable in the circumstances." Restatement (Second) of Contracts § 204 (1981).

In urging this result, the AAA does not want to suggest that the Court should encourage the lower courts to rewrite arbitration clauses. Such clauses are contracts, and the Federal Arbitration Act is emphatic that they are to be refused enforcement only on grounds applicable to contracts in general. *See* 9 U.S.C. § 2. But when an ambiguity (including an omission) in an agreement to arbitrate is susceptible to one interpretation that will bring it into conflict with the statute under which a claim is brought, and to another interpretation that will reconcile the purpose of that statute with the mandate of the Federal Arbitration Act, established principles of contract law counsel a court to construe the agreement so as to make its enforcement lawful. That is the result that *amicus curiae* AAA urges the Court to reach here.

## CONCLUSION

WHEREFORE, *amicus curiae* AAA respectfully urges the Court to reverse the decision of the Court below on the second question presented.

Respectfully submitted,

JOHN M. TOWNSEND
DANIEL WOLF
HUGHES HUBBARD & REED LLP
Washington, D.C.

JAMES H. CARTER
Chairman,
Arbitration Law Committee

June 8, 2000

FLORENCE PETERSON
*Counsel of Record*
General Counsel
AMERICAN ARBITRATION ASSOCIATION
335 Madison Avenue
New York, New York 10017-4605
(212) 716-3923

*Attorneys for Amicus Curiae The American Arbitration Association*

# APPENDICES

# APPENDIX A

## CONSUMER DUE PROCESS PROTOCOL

### Statement of Principles of the National Consumer Disputes Advisory Committee

PRINCIPLE 1. FUNDAMENTALLY-FAIR PROCESS

*All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.*

PRINCIPLE 2. ACCESS TO INFORMATION REGARDING ADR PROGRAM

*Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs. At the time the Consumer contracts for goods or services, such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program. After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.*

PRINCIPLE 3. INDEPENDENT AND IMPARTIAL NEUTRAL; INDEPENDENT ADMINISTRATION

1. ***Independent and Impartial Neutral.*** *All parties are entitled to a Neutral who is independent and impartial.*

2. ***Independent Administration.*** *If participation in mediation or arbitration is mandatory, the procedure should be administered by an Independent ADR Institution. Administrative services should include the maintenance of a panel of pro-*

*spective Neutrals, facilitation of Neutral selection, collection and distribution of Neutral's fees and expenses, oversight and implementation of ADR rules and procedures, and monitoring of Neutral qualifications, performance, and adherence to pertinent rules, procedures and ethical standards.*

3. ***Standards for Neutrals.*** *The Independent ADR Institution should make reasonable efforts to ensure that Neutrals understand and conform to pertinent ADR rules, procedures and ethical standards.*

4. ***Selection of Neutrals.*** *The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute.*

5. ***Disclosure and Disqualification.*** *Beginning at the time of appointment, Neutrals should be required to disclose to the Independent ADR Institution any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding, or any past or present relationship or experience with the parties or their representatives, including past ADR experiences. The Independent ADR Institution should communicate any such information to the parties and other Neutrals, if any. Upon objection of a party to continued service of the Neutral, the Independent ADR Institution should determine whether the Neutral should be disqualified and should inform the parties of its decision. The disclosure obligation of the Neutral and procedure for disqualification should continue throughout the period of appointment.*

## PRINCIPLE 4. QUALITY AND COMPETENCE OF NEUTRALS

*All parties are entitled to competent, qualified Neutrals. Independent ADR Institutions are responsible for establishing and*

*maintaining standards for Neutrals in ADR Programs they administer.*

PRINCIPLE 5. SMALL CLAIMS

*Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.*

PRINCIPLE 6. REASONABLE COST

1. ***Reasonable Cost.*** *Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.*
2. ***Handling of Payment.*** *In the interest of ensuring fair and independent Neutrals, the making of fee arrangements and the payment of fees should be administered on a rational, equitable and consistent basis by the Independent ADR Institution.*

PRINCIPLE 7. REASONABLY CONVENIENT LOCATION

*In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the Independent ADR Institution or by the Neutral.*

PRINCIPLE 8. REASONABLE TIME LIMITS

*ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR proc-*

*ess and, where necessary, set forth default procedures in the event a party fails to participate in the process after reasonable notice.*

## PRINCIPLE 9. RIGHT TO REPRESENTATION

*All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing. The ADR rules and procedures should so specify.*

## PRINCIPLE 10. MEDIATION

*The use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes.*

## PRINCIPLE 11. AGREEMENTS TO ARBITRATE

*Consumers should be given:*

*(a)* *clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;*

*(b)* *reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;*

*(c)* *notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and,*

*(d)* *a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.*

PRINCIPLE 12. ARBITRATION HEARINGS

1. ***Fundamentally-Fair Hearing.*** *All parties are entitled to a fundamentally-fair arbitration hearing. This requires adequate notice of hearings and an opportunity to be heard and to present relevant evidence to impartial decision-makers. In some cases, such as some small claims, the requirement of fundamental fairness may be met by hearings conducted by electronic or telephonic means or by a submission of documents. However, the Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party.*

2. ***Confidentiality in Arbitration.*** *Consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues.*

PRINCIPLE 13. ACCESS TO INFORMATION

*No party should ever be denied the right to a fundamentally-fair process due to an inability to obtain information material to a dispute. Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration.*

PRINCIPLE 14. ARBITRAL REMEDIES

*The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.*

PRINCIPLE 15. ARBITRATION AWARDS

1. ***Final and Binding Award; Limited Scope of Review.*** *If provided in the agreement to arbitrate, the arbitrator's award should be final and binding, but subject to review in*

*accordance with applicable statutes governing arbitration awards.*

2. ***Standards to Guide Arbitrator Decision-Making.*** *In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes and legal precedents.*

3. ***Explanation of Award.*** *At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award. To facilitate such requests, the arbitrator should discuss the matter with the parties prior to the arbitration hearing.*

## INTRODUCTION: GENESIS OF THE ADVISORY COMMITTEE

Recent years have seen a pronounced trend toward incorporation of out-of-court conflict resolution processes in standardized agreements presented to consumers of goods and services. Some of these processes (such as mediation and non-binding evaluation) involve third party intervention in settlement negotiations; others involve adjudication (binding arbitration). Such processes have the potential to be of significant value in making dispute resolution quicker, less costly, and more satisfying.[1]

Yet because consumer contracts often do not involve arm's length negotiation of terms, and frequently consist of boilerplate language presented on a take-it-or-leave it basis by suppliers of goods or services, there are legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers. This is particularly true in the realm of binding arbi-

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[1] *See, e.g.*, CPR Institute for Dispute Resolution, *ADR Cost Savings & Benefit Studies* (Catherine Cronin-Harris, ed. 1994)(summarizing some of the research findings on the relative advantages ADR may offer). *See also, e.g., Madden v. Kaiser Foundation Hosp.*, 17 Cal. 3d 699, 711, 552 P.2d 1178, 1186 (1976)("The speed and economy of arbitration, in contrast to the expense and delay of a jury trial, could prove helpful to all parties . . . ")

tration, where the courts are displaced by private adjudication systems. In such cases, consumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen.[2] While the results may be entirely satisfactory, they may also fall short of consumers' reasonable expectations of fairness[3] and have a significant impact on consumers' substantive rights and remedies.[4]

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[2] The arbitration agreement may be included in the "fine print" in a brochure of terms and conditions inside a box of goods. *See, e.g., Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997)(customers agreed to computer company's contract terms, including arbitration agreement, by failing to return merchandise within 30 days). *See also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV.33, 40-53 (offering a "cautionary tale" regarding employment arbitration agreement).

[3] *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J.ON DISP. RES. 267 (1995)(discussing procedural limitations of arbitration in treating consumer disputes with banks and lenders); Schwartz, *supra* note 2 (discussing issues relating to adhesion contracts involving employees and consumers); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV.1 (1997)(discussing due process concerns with binding arbitration under employment and consumer contracts). *See, e.g., Engalla v. Permanente Med. Grp.*, 938 P.2d 903 (Cal. 1997)(medical group may not compel arbitration where it administers own arbitration program, fraudulently misrepresents speed of arbitrator selection process, and then forces delays); *Broemmer v. Abortion Serv. of Phoenix*, 840 P.2d 1013 (Az. 1992)(refusing to enforce agreement in "adhesion contract" where drafter inserted potentially self-serving term requiring sole arbitrator of medical malpractice claims to be a licensed medical doctor).

[4] *See* Schwartz, *supra* note 2, at 60-61 (discussing perceptions regarding relative damages awards in court and in arbitration), 64-66 (summarizing some statistics on arbitration awards). *See also* William W. Park, *When and Why Arbitration Matters*, in THE COMMERCIAL WAY TO JUSTICE 73, 75

The use of mediation and other forms of alternative dispute resolution (ADR) by various state and federal courts has also raised concerns regarding quality, effectiveness and fairness. The response has been a number of national, state and local initiatives to establish standards for the guidance and information of courts. Until now, however, there has been no comparable national effort in the private consumer sphere.

In the spring of 1997, the American Arbitration Association (AAA) announced the establishment of a National Consumer Disputes Advisory Committee. The stated mission of the Advisory Committee is:

> *To bring together a broad, diverse, representative national advisory committee to advise the American Arbitration Association in the development of standards and procedures for the equitable resolution of consumer disputes.*

In light of its stated mission, the Advisory Committee's recommendations are likely to have a direct impact on the development of rules, procedures and policies for the resolution of consumer disputes under the auspices of the AAA.

The Advisory Committee's recommendations may also have a significant impact in the broader realm of consumer ADR. A Statement of Principles which is perceived as a broadly-based consensus regarding minimum requirements for mediation and arbitration programs for consumers of goods and services may influence the evolution of consumer rules generally and the development of state and federal laws governing consumer arbitration agreements. The standards may affect the drafting of statutes and influence judicial opinions addressing

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(G.M. Beresford Hartwell ed., 1997)("*Who* interprets an . . . agreement will frequently be more significant than *what* the applicable law says about the agreement . . .").

the enforceability of arbitration agreements pursuant to existing state or federal law.[5]

***[Pages 9-46 of the Consumer Due Process Protocol, containing a detailed discussion of each principle, have been omitted from this Appendix but may be found on the AAA's website at www.adr.org]***

## A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES

### SIGNATORIES

Dated: April 17, 1998

Some of the signatories to this Protocol were designated by their respective organizations, but the Protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

**The Honorable Winslow Christian**
*Co-chair*
Justice (Retired)
California Court of Appeal

**William N. Miller**
*Co*-chair
Director of the ADR Unit
Office of Consumer Affairs
Virginia Division of Consumer Protection
Designated by National Association of Consumer Agency Administrators

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[5] *See, e.g., Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997)(citing Due Process Protocol for Employment Disputes). The consensus-based approach of this broadly constituted group reflects the "public interest" model espoused by Professor Speidel. *See* Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996)

**David B. Adcock**
Office of the University Counsel
Duke University

**Steven G. Gallagher**
Senior Vice President
American Arbitration Association

**Michael F. Hoellering**
General Counsel
American Arbitration Association

**J. Clark Kelso**
Director
Institute for Legislative Practice
University of the Pacific
McGeorge School of Law

**Elaine Kolish**
Associate Director
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission

**Robert Marotta**
Wolcott, Rivers, Wheary, Basnight & Kelly, P.C.
Formerly Office of the General Counsel
General Motors Corporation

**Robert E. Meade**
Senior Vice President
American Arbitration Association

**Ken McEldowney**
Executive Director
Consumer Action

**Michelle Meier**
Former Counsel for Government Affairs
Consumers Union

**Anita B. Metzen**
Executive Director
American Council on Consumer Interests

**James A. Newell**
Associate General Counsel
Freddie Mac

**Shirley F. Sarna**
Assistant Attorney General-In-Charge
Consumer Frauds and Protection Bureau
Office of the Attorney General
State of New York
Designated by National Association
of Attorneys General

**Daniel C. Smith**
Vice President and Deputy General Counsel
Fannie Mae

**Terry L. Trantina**
Member
Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C.
Formerly General Attorney
AT&T Corp.

**Deborah M. Zuckerman**
Staff Attorney
Litigation Unit
American Association of Retired Persons

**Thomas Stipanowich**
Academic Reporter
W.L. Matthews Professor of Law
University of Kentucky College of Law

## APPENDIX B

## ARBITRATION RULES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES

### INTRODUCTION

Millions of consumer transactions take place each year. Occasionally there are disagreements between consumers and businesses. These disagreements can be resolved by arbitration promptly and economically.

### About the AAA

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, and government. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

### The AAA's Consumer ADR Rules

The AAA developed *Arbitration Rules for the Resolution of Consumer-Related Disputes* for consumers and businesses who want to have their disagreements resolved by arbitrators, and avoid the costs and delays of litigation. Services are available through the Association's Dallas Case Management Center.

To use the Rules, a request for arbitration must be (1) filed by the consumer and (2) involve a claim under $10,000.

### Mediation

Mediation is also available to assist parties to resolve their disputes. If the parties want to use mediation, they may do so under the Association's Commercial Mediation Rules.

Administrative Fees

The Association charges a fee for the administration of a consumer arbitration under these rules. To begin the process, consumers must accompany their request for arbitration with $125 as their portion of the arbitrator's fee. The AAA will send notice to the business that the AAA has received a consumer case under these rules. An administrative fee of $500 is then due from the business, together with $125 as their portion of the arbitrator's fee.

## GLOSSARY OF TERMS

Consumer

Consumer refers to an individual who purchases or leases goods or services, or contracts to purchase or lease goods or services, intended primarily for personal, family or household use.

Business

Business refers to a seller or lessor of goods or services to consumers for personal, family or household use.

ADR Process

An ADR (Alternative Dispute Resolution) Process is a method for out-of-court resolution of conflict through the intervention of third parties. Mediation and arbitration are the most widely used ADR processes.

Mediation

Mediation refers to a process in which an impartial person helps parties to a dispute to communicate and to make voluntary, informed choices in an effort to resolve their dispute. A mediator, unlike an arbitrator, does not issue a decision regarding the merits of the dispute, but instead

facilitates communication between the parties to help them arrive at a mutually agreeable settlement.

Desk Arbitration

Arbitration is a process in which parties submit disputes to a neutral third person for a decision on the merits. Each party has an opportunity to present evidence to the arbitrator in writing. Arbitrators are not required to follow the Rules of Evidence used in court. Arbitrators decide cases by written decisions or "awards." An award is usually binding on the parties, depending on the agreement to arbitrate. If necessary, a "binding" arbitration award may be enforced as a court judgment, but judicial review of arbitration awards is limited.

Neutral

A Neutral is a mediator, arbitrator, or other independent, impartial third person selected to serve in a dispute.

ADR Agreement

An ADR Agreement is an agreement between a business and a consumer to submit disputes to mediation, arbitration, or other ADR Processes. As used in this statement, the term includes provisions in standard contracts furnished by providers which signify the assent of the consumer and provider to such processes (although the assent may only be the "generalized assent" typically given by consumers to standard terms).

ADR Program

An ADR Program is any program or service established by or used by a provider of goods and services for out-of-court resolution of disputes.

Independent ADR Institution

An Independent ADR Institution is an organization that provides independent and impartial administration of ADR programs for consumers and businesses.

## ARBITRATION RULES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES

1. Agreement of Parties and Applicability

Parties have agreed to arbitration by the American Arbitration Association (AAA) under these rules whenever the AAA or its rules are referred to in an agreement between a consumer and a business. The AAA will apply the rules that are in effect at the time the request is filed. The authority and duties of the AAA are defined by the parties in their agreement and in these rules.

These procedures will only apply in cases where the claim is under $10,000, exclusive of interest, arbitration fees, and costs. These rules may not be used where there is no stated claim. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction.

2. Initiation Under an Arbitration Agreement

Where an agreement to arbitrate exists, arbitration may be initiated as follows:

(a) The consumer must notify the business, in writing, that it wants to arbitrate a dispute. This notification is referred to as the "request" for arbitration. The request should:

- briefly explain the dispute,
- list the names and addresses of the consumer and the business,
- specify the amount of money involved and,
- indicate the solution sought.

The consumer must also send two copies of the request to the AAA, at the time it sends the request to the business. When sending the request to the AAA, the consumer must attach a copy of the arbitration agreement together with $125 for its share of the arbitrator's compensation.

(b) The business may answer the consumer's request. The answer must be sent to the AAA within 10 calendar days after the AAA acknowledges receipt of claimant's request. The answer must also:

- be in writing,
- be sent, in duplicate, to the AAA,
- be simultaneously sent to the consumer.

If an answer is not sent on time, it will be assumed that the business disagrees with the consumer's claim. The arbitration will go forward, even if the business does not file an answer.

3. Initiation Under a Submission

Where no agreement to arbitrate exists, the consumer and the business may agree to arbitrate an existing dispute. To begin an arbitration under these rules, the parties must jointly send the AAA a submission agreement. The submission agreement must:

- be in writing,
- briefly explain the dispute,
- list the names and addresses of the consumer and the business,
- specify the amount of money involved (if any), and,
- indicate the solution sought.

The parties should send two copies of the submission to the AAA. When sending the submissions to the AAA, the consumer must include $125 for its share of the arbitrator's compensation and the business must include $500 for the

administrative fee, in addition to $125 for its share of the arbitrator's compensation.

4. The Arbitrator

(a) Appointment

When the AAA receives the request or submission, the AAA will appoint an arbitrator to serve. The parties will have seven calendar days from the time the AAA notifies them of the arbitrator to submit any factual objections to that person.

(b) Disclosure and Challenge Procedure

(i) The arbitrator must disclose to the AAA any circumstance that is likely to affect his or her impartiality. This includes any bias, any financial or personal interest in the result of the arbitration, or any past or present relationship with the parties or their representatives. If the AAA receives disclosed information, it will share the information with the parties and ask for their comments.

(ii) If either party objects to the arbitrator continuing to serve on the case, the AAA will decide whether to remove the arbitrator. The AAA will inform the parties of its decision.

5. Proceedings on Documents

Disputes under these rules are resolved by reviewing documents submitted by the parties. Documents must be sent to the AAA for forwarding to the arbitrator.

6. Optional Hearing by Telephone

A party may request in writing that the arbitrator hold one hearing by telephone. The telephonic hearing may occur even if the other party refuses to participate. An additional $100

must accompany a request for a telephonic hearing. If a party wants to have an in-person hearing, instead of a telephonic hearing, the dispute must be administered under the AAA's Commercial Arbitration Rules. The party who requests an in-person hearing must pay all the administrative fees, expenses, and compensation costs in the Commercial Arbitration Rules.

7. Representation

Parties may be represented by counsel, if they choose.

8. Evidence

(a) The parties may offer evidence about the dispute. The arbitrator has the authority to determine which evidence is relevant and material. Parties are expected to produce whatever evidence is requested by the arbitrator. The parties do not have to follow legal rules of evidence.

(b) An arbitrator, or other person authorized by law to subpoena documents, may do so upon the request of any party or independently.

9. Closing of Hearing

(a) The hearing will be closed on the date the AAA sends the final documents to the arbitrator.

(b) The arbitrator may reopen the hearing to accept additional evidence at any time before the award is written and signed.

10. Waiver of Rules

A party's right to object will be considered waived if the party proceeds with the arbitration knowing that the other party has not followed a provision or requirement of these rules, and fails to timely object in writing.

11. Extensions of Time

The AAA or the arbitrator may give each party one seven-day extension of any deadline in these rules.

12. Serving of Documents

(a) The AAA may notify the parties by telephone. The AAA, the arbitrator, and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Notices may be transmitted by electronic mail (E-mail), where all parties and the arbitrator agree.

(b) All documents pertaining to the arbitration, or related court action, or the entry of judgment on any award, may be served on a party by mail addressed to the party, or its representative, at its last known address. Notices may also be made by personal service, in or outside the state where the arbitration is to be administered, provided that reasonable opportunity to be heard with regard to the dispute has been given to the party.

(c) When sending documents to the AAA, a party must also send copies to the other party at the same time.

13. The Award

(a) unless the parties agree otherwise, the arbitrator must make his or her award within 14 calendar days after the AAA transmits the final statements and proofs to the arbitrator.

(b) Awards shall be in writing and shall be executed as required by law.

(c) In the award, the arbitrator should apply any identified, pertinent contract terms, statutes, and

legal precedents. The arbitrator may grant any remedy or relief that the parties could have received in court. The award shall be final and binding, but subject to review in accordance with applicable statutes governing arbitration awards.

14. Release of Documents for Judicial Proceedings

Upon the written request of a party, the AAA will send the party certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration. The requesting party will be charged the cost of this service.

15. Applications to Court and Exclusion of Liability

(a) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(b) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(c) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

16. Arbitrator's Compensation

Arbitrators serving under these rules receive a fee of $250, paid equally by the parties, for considering the parties' evidence and writing an award.

17. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules as they relate to the arbitrator's powers and duties. All other procedures shall be interpreted and applied by the AAA.

## ADMINISTRATIVE FEES

When filing a request for arbitration, the consumer must include $125 for its share of the arbitrator's compensation. When the AAA acknowledges notice of the request for arbitration, it will bill the business for the $500 administrative fee, and $125 for its share of the arbitrator's compensation.

If the business fails to pay its fees and share of arbitrator compensation, the consumer may advance such funds, which shall subsequently be allocated to the business in the arbitrator's award.

Any party requesting a telephonic hearing must remit an additional $100.

All fees are non-refundable.

Supreme Court, U.S.
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No. 99-1235

IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION
*Petitioners,*

v.

LARKETTA RANDOLPH
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals For The Eleventh Circuit**

## BRIEF OF THE ALABAMA MANUFACTURED HOUSING INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE WRIT OF CERTIORARI

ROBERT E. SASSER*
TAMARA A. STIDHAM
PATRICK L. W. SEFTON
SIROTE & PERMUTT, P.C.
One Commerce Street, Suite 700
P.O. Drawer 4539
Montgomery, Alabama 36103-4539
(334) 261-3400
**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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GREEN TREE FINANCIAL CORP.—ALABAMA AND GREEN TREE FINANCIAL CORPORATION
*Petitioners,*

v.

LARKETTA RANDOLPH
*Respondent.*

---

**On Writ of Certiorari**
**To the United States Court of Appeals**
**For the Eleventh Circuit**

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## THE ALABAMA MANUFACTURED HOUSING INSTITUTE RESPECTFULLY SUBMITS THE FOLLOWING BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE WRIT OF CERTIORARI

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## INTEREST OF AMICI CURIAE

The Alabama Manufactured Housing Institute ("AMHI") respectfully submits the following brief in support of the Writ of Certiorari.*

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*Consents of counsel for the Petitioners and for the Respondent herein have been obtained and filed with the clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* hereby certify that no counsel for either party has authored the brief, in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or counsel, have made monetary contributions to the preparation or submission of this brief.

AMHI is a non-profit organization representing all segments of the manufactured housing industry. It is dedicated to providing its members with the tools and information needed to help shape a successful business environment. Its members include nearly 500 manufactured home manufacturers, retailers, parts suppliers, providers of services including delivery and installation, finance and insurance companies, community owners and developers. These members work together to participate in the legislative and regulatory process at the local, state, and national levels.

AMHI has an interest in this case in that the members of AMHI regularly enter into contracts which contain arbitration clauses such as are at issue in this case. The members of AMHI have an interest in enforcement of agreements to submit disputes arising from these contracts to arbitration in order to control the increasing costs of litigation affecting all aspects of the manufactured home industry. The state of Alabama has historically been hostile to enforcement of arbitration clauses as evidenced by the necessity of the Writs of Certiorari granted by this Court in *Allied Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995) and *Terminix v. Jackson*, 513 U.S. 1123 (1995) and the lack of any state arbitration enforcement statute. The decision of the Eleventh Circuit will promote further hostility towards arbitration clauses and attempts to avoid their enforcement pursuant to the Federal Arbitration Act by allowing a party to circumvent an order compelling arbitration by appeal prior to participating in the arbitration process. Furthermore, by holding that an arbitration agreement which is silent as to the cost of arbitration is unenforceable, the Eleventh Circuit has thwarted the federal policy favoring arbitration and provided additional grounds for trial courts to avoid the mandates of the Federal Arbitration Act. These consequences impair the ability of the members of AMHI to rely on the arbitration clauses for which they contracted to avoid the high costs and time of litigation.

## SUMMARY OF ARGUMENT

Despite the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and this Court's clear pronouncements that the enactment of the FAA signifies a strong federal policy favoring arbitration, the enforcement of arbitration agreements continues to be met with much hostility and to be more closely scrutinized by the courts than other contracts. The issues before this Court are particularly significant because they will greatly impact the ability of parties to arbitration agreements to realize the full benefit of their contracts to arbitrate the disputes between them.

In addition to the arguments presented by the Petitioners regarding the issue of whether appellate jurisdiction exists for an appeal taken from a dismissal with prejudice when the dismissal is based upon an order granting arbitration, *amicus curiae* submits for this Court's consideration as a basis for reversing the decision of the Eleventh Circuit, that limited appellate jurisdiction exists in such a matter, but not to the extent exercised by the Eleventh Circuit and promoted by the Respondent. As explained below, the FAA sets forth a procedure for dispensing with suits in which the claims have been referred to arbitration. To the extent that the district court failed to follow that scheme the Eleventh Circuit should have reversed the dismissal with prejudice and directed the district court to enter an order staying the action. The Eleventh Circuit should not have engaged in an analysis of the correctness of the decision to refer the matter to arbitration.

Moreover, it is the position of *amicus curiae* that the Eleventh Circuit did not have jurisdiction to engage in the analysis as to the enforceability of the arbitration clause because there was an order directing arbitration. To the extent that the Eleventh Circuit engaged in such an analysis, the holding is in error because it failed to follow general contract principles governing the construction of silent terms, it ignored the federal policy favoring arbitration, and it erroneously placed the burden on the party

seeking enforcement of the arbitration to uphold the arbitration agreement.

Accordingly, for the reasons set forth herein, the decision of the Eleventh Circuit in this matter is due to be reversed.

## ARGUMENT

This case seeks guidance from this Court as to the impact and effect of the Federal Arbitration Act upon the duty and authority of a trial court and an appellate court in the review and enforcement of an agreement to arbitrate disputes between parties. Heretofore, when faced with other issues arising out of the scope and requirements of the FAA, this Court has provided guiding principles as to the legislative intent behind the FAA and the premises necessary for the proper implementation of the FAA. This Court has proclaimed that "[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). The questions for consideration before this Court ask, in light of this liberal federal policy favoring arbitration, (1) when a court grants arbitration, what is the proper method for disposing of the case and in what context is that order reviewable by an appellate court, and (2) does the absence of provisions addressing the allocation of costs of the arbitration render the clause unenforceable.

Concerning the first issue, the Petitioners and the Respondent, as well as the decision by the Eleventh Circuit, suggest that it is an all or nothing proposition. In other words, the Petitioners suggest that any order, at least in an "embedded" proceeding, granting arbitration is not immediately reviewable and therefore, there is no appellate jurisdiction. The Respondent argues, and

the Eleventh Circuit found, that appellate jurisdiction existed when a case was dismissed with prejudice and thereby gave rise to a full review of the order granting arbitration. AMHI, as *amicus curiae*, respectfully suggests for the reasons set forth below that there is a third alternative which promotes the policy favoring arbitration as expressed by the intent of Congress and that this case provides this Court the opportunity to direct the courts of this land as to the proper course of action for disposing of a case in which all of the claims have been sent to arbitration. This alternative is that an appellate court may review the order of dismissal, but may not engage in a determination regarding the arbitration issue.

With respect to the "silence" issue, AMHI maintains that this issue was not properly before the Eleventh Circuit. Moreover, the Eleventh Circuit erred in its construction of the "silent" terms and its allocation of the burden of proof with respect to the issue.

## I. THE ELEVENTH CIRCUIT EXCEEDED THE SCOPE OF ITS APPELLATE JURISDICTION IN ITS REVIEW OF THE DECISION GRANTING THE MOTION TO COMPEL ARBITRATION.

At the heart of the issue concerning appellate jurisdiction is Section 16 of the FAA, which provides:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

The text of Section 16 establishes two categories of decisions —those which may be appealed, subsection (a), and those which may not be appealed, subsection (b). As recognized in the *Practice Commentary* following Section 16:

> Subdivision (a) of § 16 enumerates the situations in which an immediate appeal from an arbitrability determination is allowed. It applies for the most part to determinations against arbitration. Subdivision (b) enumerates the situations in which and appeal is not to be allowed, and all of them are decisions in favor of arbitration.

David D. Siegal, *Practice Commentary* to 9 U.S.C.A. § 16 (West 1999). In view of the apparent theme of Section 16 that

orders favoring arbitration should not be subject to review and those denying arbitration should - the courts are split as to the impact that this theme should have on the construction of Section 16(a)(3), which provides that "a final decision with respect to an arbitration that is subject to this title" may be appealed.

The majority of the circuits, recognizing that Congress expressed an intent that judicial involvement in arbitration should be kept to a bare minimum, has construed any order in an "embedded proceeding" granting arbitration as an interlocutory order, and therefore not subject to appellate review. *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F. 3d 626 (1st Cir. 1998); *John Hancock Mut. Life Ins. v. Olick*, 151 F.3d 132 (3d Cir. 1998); *Napleton v. Gen. Motors Corp.*, 138 F. 3d 1209 (7th Cir. 1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital* Corp., 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994); *Humphrey v. Prudential Securities, Inc.*, 4 F.3d 313 (4th Cir. 1993). These courts have recognized that if a party is forced to participate in endless judicial review prior to obtaining his right to arbitration, all benefits of the contract to arbitrate will be lost. In order to prevent such a result and to promote a policy favoring arbitration, the majority has characterized an order granting arbitration, regardless of whether it also dismisses the entire action, as an interlocatory order. As an interlocatory order, it is not subject to appellate review. While it would seem that it was the intent of Congress to keep judicial involvement at a bare minimum, the artificial designation of an order as an interlocutory order, notwithstanding its express language suggesting finality, is troublesome at best.

Conversely, the minority of courts, including the Eleventh Circuit in the case at bar, has rejected the construction that orders granting arbitration are interlocutory orders and discounted the apparent intent of Congress and the policy as declared by this Court of favoring arbitration. These courts have used Sec-

tion 16(a)(3) for a full review of the order granting arbitration, including the issue of whether the matter was in fact subject to arbitration. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995); *Arnold v. Arnold Corp.*, 920 F.3d 1269 (6th Cir. 1990).

AMHI respectfully suggests that neither approach complies with the intent of Congress. It is undeniable that Section 16(a)(3) provides appellate review for a "final decision with respect to arbitration." One might argue that this language should be construed as applying only to a final decision rendered in the arbitration itself, and not to the decision to send the matter to arbitration. After all, when a matter is referred to arbitration, there remains the decision to be made on the merits of the matter, and such decisions are subject to limited review under Sections 9-12 of the FAA.

Nevertheless, assuming that the "final decision" language of Section 16(a)(3) applies to a court's order of dismissal, which in this case was with prejudice, the question is what should be the nature and scope of the appellate court's review. AMHI respectfully suggests that the review should be limited to the "dismissal" of the action and not expanded to a review of the decision to grant arbitration. Section 4 of the FAA provides parties to an arbitration agreement a mechanism to seek specific performance or enforcement of that agreement. 9 U.S.C. § 4. Section 3 provides that a court "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3. Thus, under the scheme established by the FAA, when a court grants arbitration, the proper course of action is to stay the action pending completion of the arbitration. Such construction is in line with the review process contemplated by Section 16.

Pursuant to the guidelines of the FAA, the district court should have stayed the action when it granted arbitration. Therefore, when the district court dismissed with prejudice the action after granting arbitration, it went beyond the action contemplated by the FAA. A dismissal with prejudice arguably would appear to be a "final decision" and thus, subject to appeal. However, in reviewing the matter, the Eleventh Circuit should have limited its review to the issue of whether the dismissal with prejudice of the action was proper pursuant to the FAA in connection with an order granting arbitration. In other words, the proper appeal to the Eleventh Circuit was whether the district court erred in dismissing the action with prejudice instead of staying the action in accordance with Section 3 of the FAA when it compelled arbitration. The review of the Eleventh Circuit should have been limited to this issue alone and it should not have engaged in an review of whether the claims were subject to arbitration in view of the order of the district court granting arbitration.

This reasoning finds support in the analogous area of abstention. In essence, when a district court grants arbitration, it is abstaining from exercising its jurisdiction in favor of another forum, which was previously agreed to by the parties. Similarly, under the doctrine of abstention, a federal court is abstaining from exercising its jurisdiction in favor of another forum, the state court, to allow the other forum to address the issue presented. This Court has recognized that in the context of abstention, when a district court elects not to address an issue on the grounds of abstention, "the proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts." *American Trial Lawyers Assn. v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973)(citing *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 512-13 (1972); *Zwickler v. Koota*, 389 U.S. 241, 244-445, n.4 (1967)). Similarly, in the context of arbitration under the FAA, when the court refers the matter to the arbitration forum, the proper course of action is for the dis-

trict court to retain jurisdiction by staying the action pursuant to Section 3 of the FAA, not to dismiss the action with prejudice.

> [The FAA] is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration. Its inherent acknowledgment is that arbitration is a form of dispute resolution designed to save the parties time, money, and effort by substitution for the litigation process the advantages of speed, simplicity, and economy associated with arbitration. Its theme is that judicial involvement in the process should be kept to the barest minimum to avoid undermining these goals. . . . The mission of § 16 is to assure that if the district court does determine that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward.

David D. Siegel, *Practice Commentary* to 9 U.S.C.A. § 16 (West 1999).

Considering the undeniable federal policy favoring arbitration and the harm which will occur to a party entitled to arbitration who is forced to participate in seemingly endless appellate review prior to obtaining arbitration, as well as judicial economy on the whole, the courts should be provided the necessary guidance as to the proper disposition of cases when they are referred to arbitration. The FAA provides that the proper course of action is to stay a proceeding when a matter is sent to arbitration. Allowing parties to evade arbitration under the guise of repeated appellate review, thwarts the intent of Congress in enacting the FAA and renders arbitration contracts on less than equal standing with other contracts.

Because the Eleventh Circuit went beyond the proper review of the matter before it, the decision should be reversed with instructions to remand the decision to the district court to stay the action pending arbitration.

## II. THE ELEVENTH CIRCUIT ERRED BY CONSTRUING THE SILENCE OF THE ARBITRATION AGREEMENT AS TO THE ISSUE OF COSTS IN A MANNER SO AS TO RENDER THE AGREEMENT UNENFORCEABLE.

The Eleventh Circuit held that the arbitration clause was unenforceable because it failed to provide the minimum guarantees required to ensure the Respondent's ability to vindicate her statutory rights. *Randolph v. Green Tree,* 178 F.3d 1149, 1158 (11th Cir. 1999). The Eleventh Circuit determined that the required minimum guarantees were lacking because the agreement was silent as to the payment of fees. The Eleventh Circuit expressed its concern as follows:

> The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum, and thus falls within our holding in *Paladino*. This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nonetheless be saddled with fees and costs in excess of any award. It does not say whether the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs, apply to the proceeding, whether some other set of rules applies, or whether the parties must negotiate their own set of rules.

178 F.3d at 1158. Thus, the Eleventh Circuit, without any reference to normal rules of contract construction assumed the worst case scenario so as to invalidate the contract of the parties.

The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and

to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)(citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, n. 4 (1974)). "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements [, therefore,] as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 25 (1983). Furthermore, a court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

AMHI, as *amicus curiae,* respectfully suggests that the Eleventh Circuit failed in its duty to treat the arbitration clause on the same level as other contracts and to resolve any doubt in favor of arbitration. The center of concern for the Eleventh Circuit is the silence of the agreement with respect to the allocation of the payment of fees and costs. In the context of an ordinary contract, if it is silent as to essential terms a court will look to applicable contract law to determine the manner to construe such terms. Generally, contract law requires that when a contract is silent as to a term, it should be assumed that the term is that which is used by ordinary trade or custom and all efforts at construction should be made to uphold the contract as a whole. *See Restatement (Second) of Contracts* §§ 202(5), 203(a), 204 (1981). Instead of looking to applicable contract law to determine the proper construction with respect to silent terms, the Eleventh Circuit assumed that the silent terms could potentially place costs on the Respondent that might impair her from pursu-

ing statutory rights. The Eleventh Circuit made no attempt to construe the contract to uphold the parties' agreement to arbitrate their claims nor the federal policy favoring arbitration. Accordingly, the decision with respect to the enforceability of the arbitration agreement is to be reversed.

## CONCLUSION

The Federal Arbitration Act evidences a strong federal policy favoring arbitration and minimizing judicial involvement once it has been determined that a matter should proceed to arbitration. The decision by the Eleventh Circuit is due to be reversed because it improperly exercised appellate jurisdiction beyond a review of the order of dismissal to a review of the decision to send a matter to arbitration prior to the completion of the arbitration proceeding. The courts should be provided guidance that the proper course of action when a matter is referred in its entirety to arbitration is to stay the action pending resolution of the arbitration proceeding. Additionally, the decision of the Eleventh Circuit is due to be reversed because it placed the arbitration agreement in an inferior position to other contracts and because it did not apply applicable law as to the construction of silent terms and attempt to uphold the contract if possible.

Accordingly, should this Court accept the arguments of *amicus curiae,* Alabama Manufactured Housing Institute, the decision of the United States Court of Appeals for the Eleventh Circuit in this matter is due to be reversed.

Respectfully submitted,

ROBERT E. SASSER*
TAMARA A. STIDHAM
PATRICK L.W. SEFTON
SIROTE & PERMUTT, P.C.
One Commerce Street
P.O. Box 4539
Montgomery, Alabama 36103-4539
(334) 261-3400
*Counsel of Record*

(10)

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In The

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP. – ALABAMA, and GREEN TREE FINANCIAL CORPORATION,

*Petitioners,*

v.

LARKETTA RANDOLPH,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ALAN S. KAPLINSKY*
DAVID H. PITTINSKY
JEREMY T. ROSENBLUM
THOMAS B. ROBERTS
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

*Of Counsel:*

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4/00

## QUESTION PRESENTED

Does the inability of Respondent to pursue a federal Truth in Lending Act class action under the arbitration clause in the agreement she executed create a basis for invalidating the arbitration clause?

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## BRIEF AMICUS CURIAE

This *amicus curiae* brief is submitted in support of the Petitioners, Green Tree Financial Corp. – Alabama and Green Tree Financial Corporation. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. The Chamber serves as the principal voice of the business community. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business. The Chamber has a particular interest in this case since it addresses an issue of great concern to its members – the enforceability in consumer contracts of pre-dispute arbitration clauses, which are used by many Chamber members.

## SUMMARY OF ARGUMENT

Under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§1 *et seq.*, an arbitration agreement must be

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber of Commerce of the United States of America states that this brief was prepared in its entirety by the Chamber and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than the Chamber, its members or their counsel.

enforced as to a statutory claim unless the language, history or purpose of the statute shows that Congress intended to preclude arbitration. In her Brief in Opposition, Respondent argued that the class action is an indispensable mechanism for redressing and deterring violations of the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§1601 *et seq.* She further argued that TILA's alleged policy favoring class actions overrides the pro-arbitration policy of the FAA and therefore allows her to disavow her arbitration agreement by filing a TILA class action. These arguments should be rejected because the language, history and purpose of TILA show that Congress did not intend to preclude arbitration.

TILA and its legislative history do not mention arbitration, much less elevate a consumer's after-the-fact desire to bring a TILA class action over the consumer's pre-existing agreement with the creditor to arbitrate such disputes. To be sure, Congress has not eliminated TILA class actions altogether. Rather, in light of concerns about the risk of "horrendous, possibly annihilating punishment" in TILA class actions, *Ratner v. Chemical Bank*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972), Congress has expressly *limited* the quantum of class action relief available under TILA.

Just as Respondent cannot show that the language or history of TILA's class action provisions precludes arbitration of TILA claims, she cannot show that TILA's remedial and deterrent purposes require class actions. In an individual proceeding, TILA provides the prevailing consumer with: (1) any actual damages resulting from the violation; (2) $100 to $1,000 of statutory damages ($200 to $2,000 in connection with a closed-end loan, such as the loan to Respondent, secured by real property or a dwelling); and (3) attorneys' fees and the costs of the

proceeding. 15 U.S.C. §1640(a). Because prevailing consumers are entitled to attorneys' fees and the costs of the proceeding, consumers with valid TILA claims can readily obtain redress in individual actions, particularly proceedings that can be handled with the ease, simplicity and speed characteristic of arbitration.

Moreover, TILA's powerful administrative and criminal enforcement mechanisms serve to deter TILA violations without the necessity of any resort to class actions. Both the Federal Trade Commission (the "FTC") and the federal banking agencies are authorized to issue cease and desist orders and to obtain ancillary relief against creditors that violate TILA. These agencies can impose substantial monetary penalties against such creditors and can order them to make restitution to consumers for finance charge and annual percentage rate ("APR") disclosure errors. Indeed, these agencies are *required* to order class-wide restitution to consumers whenever a creditor systematically discloses a finance charge or APR that is materially lower than the actual figure. Creditors can also be fined and jailed for knowing and willful violations of the statute.

Since Respondent cannot show that TILA's language, history or purpose manifests a congressional intent to preclude the waiver of a judicial forum, "the fact that [TILA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (approving mandatory arbitration of a claim under the Age Discrimination in Employment Act (the "ADEA"), even though the ADEA, unlike TILA, expressly authorizes class actions) (citation omitted). Accordingly, this Court should hold that the unavailability of class action relief neither

vitiates nor excuses the enforcement of an agreement to arbitrate a TILA claim.

## ARGUMENT

### I. Respondent Bears The Burden Of Showing That The Text, Legislative History Or Purpose Of TILA Conflicts With Arbitration Of Her TILA Claim.

In *Gilmer*, this Court enforced under the FAA mandatory arbitration of an ADEA claim. While it acknowledged in theory that "all statutory claims may not be appropriate for arbitration," this Court went on to affirm that –

> the burden is on [the party opposing arbitration] to show that Congress intended to preclude a waiver of a judicial forum for [statutory] claims . . . . See [*Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)]. If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or any "inherent conflict" between arbitration and the [statute's] underlying purposes. *See ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." [*Moses H. Cone Mem'l Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)].

500 U.S. at 26.

Under the rule enunciated in *Gilmer* and elsewhere, this Court has repeatedly held that federal statutory claims are subject to arbitration.[2] In *Moses H. Cone*, this

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[2] *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Carriage of Goods by Sea Act); *Gilmer* (ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (securities laws); *Shearson/American Express,*

Court held that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." 460 U.S. at 20 (emphasis in original). Repeatedly, lower federal courts have held that TILA claims subject to an arbitration agreement must be arbitrated even if they have been asserted in putative class actions.[3] While two district courts have now accepted the unfounded argument that TILA's supposed purpose to promote class actions is incompatible with an arbitration clause that precludes relief in a class action,[4] as demonstrated below there is no federal policy favoring TILA class actions, and arbitration of TILA claims is fully compatible with TILA's purposes.

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*Inc. v. McMahon*, 482 U.S. 220, 232-233 (1987) (RICO and securities laws); *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust laws).

[3] *See, e.g., Marsh v. First USA Bank, N.A.*, No. 3:99-CV-0783-T (N.D. Tex. May 24, 2000) (Lodging, Exh. A); *Brown v. Surety Finance Service, Inc.*, 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. Mar. 23, 2000); *Thompson v. Illinois Title Loans, Inc.*, 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. Jan 6, 2000); *Sagal v. First USA Bank, N.A.*, 69 F.Supp.2d 627 (D. Del. 1999); *Zawikowski v. Beneficial National Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999); *Randolph v. Green Tree Financial Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1997), *rev'd on other grounds*, 178 F.3d 1149 (11th Cir. 1999); *Lopez v. Plaza Finance Co.*, 1996 WL 210073 (N.D. Ill. April 25, 1996); *Meyers v. Univest Home Loan, Inc.*, 1993 WL 307747 *5 n.8 (N.D. Cal. Aug. 4, 1993) (in compelling arbitration of claim of named plaintiff in TILA and state consumer protection act class action, court observed that contrary holding would carve a "gaping exception" into the FAA, allow circumvention of the FAA and "plainly undermine Congress's policy to promote the enforceability of such agreements").

[4] *Lozada v. Dale Baker Oldsmobile*, 2000 U.S. Dist. LEXIS 4122 (W.D. Mich. Mar. 27, 2000); *Johnson v. Tele-Cash*, 82 F. Supp. 2d 264 (D. Del. 1999).

## II. Nothing In TILA's Language Or Legislative History Supports A Contention That TILA Class Actions Are Entitled To Any Special Protection Against Waiver Of A Judicial Forum.

In *Gilmer*, 500 U.S. at 32 (citation omitted), this Court flatly concluded:

> [E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

This Court endorsed mandatory arbitration of the ADEA claim in *Gilmer* even though the ADEA – unlike TILA – expressly authorizes class actions. Section 626(b) of the ADEA, 29 U.S.C. §626(b), provides that the ADEA shall be enforced in accordance with Section 216 of the Fair Labor Standards Act, 29 U.S.C. §216. In turn, Section 216 provides that "an action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees *for and in behalf of himself or themselves and other employees similarly situated.*" 29 U.S.C. §216(b) (emphasis added).

TILA does not contain a single reference to arbitration, either in its language or history. By contrast to the ADEA, it does not authorize class actions. As the district court in this case correctly noted:

> §1640 does not create a "statutory right" to pursue class action litigation or other judicial redress, as plaintiff contends. Section 1640 merely provides for jurisdictional requirements and liability *limitations*. Providing for class action litigation does not necessarily preclude any other type of dispute resolution or provide Plaintiff with a substantive "right".

*Randolph, supra*, 991 F. Supp. at 1418 (emphasis in original).

TILA's only reference to class actions is contained in Section 130(a)(2)(B), 15 U.S.C. §1640(a)(2)(B), which *limits* the relief that would otherwise be available. Conversely, under Section 130(a)(2)(A), 15 U.S.C. §1640(a)(2)(A), a plaintiff who establishes a TILA violation in an individual action is entitled to statutory damages of $100-$1,000 ($200-$2,000 in a case involving a closed-end loan, such as the loan to Respondent, secured by real property or a dwelling).[5] Under Section 130(a)(2)(B) of TILA, 15 U.S.C. §1640(a)(2)(B), statutory damages are capped in a class action, without regard to – indeed, in derogation of – the minimum recovery that class members could obtain in individual actions:

> [The class may recover] such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor.

Moreover, the maximum statutory damages award is **not** assured. Rather, the court must consider the amount of any actual damages; the frequency and persistence of compliance violations; the resources of the creditor; the number of persons adversely affected; and the extent to

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[5] The recovery of statutory damages in an individual or class action is in addition to any actual damages the plaintiff can establish under Section 130(a)(1) of TILA, 15 U.S.C. §1640(a)(1), and is also in addition to the right to attorneys' fees and costs of the proceeding under Section 130(a)(3) of TILA, 15 U.S.C. §1640(a)(3).

which violations were intentional. 15 U.S.C. §1640(a)(3). *See Kedziora v. Citicorp National Services, Inc.*, 901 F. Supp. 1321 (N.D. Ill. 1995) (applying statutory factors and awarding $37,600 to class in lieu of maximum award of $376,990).

The legislative history of TILA's class action provisions is also wholly compatible with the arbitration of individual TILA claims. When originally enacted, TILA contained no specific provisions relating to class actions. Plaintiffs pursued TILA class actions under Rule 23 but the courts expressed grave concerns that permitting class-wide recovery of the statutory $100 minimum provided by TILA "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act." *Ratner v. Chemical Bank*, 54 F.R.D. at 416.

To address this problem and to balance protection of financial institutions from disproportionate and windfall awards for technical TILA violations with competing enforcement objectives, Congress enacted specific limitations on statutory damages recoveries in TILA class actions. In 1974, the limit was initially set at the lesser of $100,000 or 1% of the creditor's net worth and, in 1976, it was adjusted to the lesser of $500,000 or 1% of net worth. While Congress did not elect to eliminate TILA class actions, it continued to express concern about the potential mischief of such proceedings:

> The committee is aware of the many difficulties surrounding the use of class actions for civil penalties or punitive damages. . . . *We are hopeful that there may be workable and effective substitutes for the class action as a consumer enforcement device not only for this Act but also for other similar legislation.*

S. Rep. No. 94-590, at 8 (1976) (footnotes omitted; emphasis added).[6]

Congress again addressed problems with TILA class actions two decades later, when it found it necessary to declare a moratorium on certain TILA class actions due to an avalanche of class actions "filed because of technical violations of disclosure requirements provided in the Truth in Lending Act." 141 Cong. Rec. H4120-04, H4122 (daily ed. April 4, 1995) (Statement of Rep. Vento). One House member explained the purpose behind the class action moratorium as follows: "Certainly when lawyers start lining their pockets based on technicalities to keep people from having to pay [borrowed] funds back, then it is time for the Congress to come forward." *Id.* Another House member asserted: "We should not even have a piece of legislation like this" permitting class actions. *Id.* at 4122. In addition, in supporting the moratorium, several House members specifically recognized that halting class actions would not defeat the remedial or policing

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[6] Many of the agency enforcement powers discussed *infra* in Section IV were adopted by Congress after the time S. Rep. No. 94-590 (1976) called for "workable and effective substitutes for the class action." In 1978, Congress afforded the federal banking agencies the power to impose civil penalties for violations of the law, including TILA. Pub. L. 95-630, §107(e)(1), adding 12 U.S.C. §1818(i)(2). In 1980, as part of the Truth in Lending Simplification and Reform Act, Congress expressly authorized the TILA enforcement agencies to order restitution for specified TILA violations and **mandated** that they order restitution for any such violations resulting from a clear and consistent pattern or practice of violations. Pub. L. 96-221, §608(a), adding 15 U.S.C. §1607(e). And in 1989, as part of the Financial Institutions Reform, Recovery, and Enforcement Act, Congress substantially enhanced the cease and desist powers of the federal banking agencies. Pub. L. 101-73, §902(a)(2)(A), adding 12 U.S.C. §1818(b)(6)-(8).

functions of TILA because the moratorium "does not prevent individual consumers from bringing suit." *Id.* at 4121.

In short, TILA's legislative history shows that Congressional concern about TILA class actions has led to the enactment of a series of *limitations* on such actions. It does not show that TILA class actions must be permitted to move forward at the expense of the fundamental public policies embedded in the FAA. Indeed, there is nothing in TILA or its legislative history that evidences any hostility to an arbitral forum.

## III. Class Actions Are Not Needed To Provide Consumers With An Effective Remedy For TILA Violations.

"So long as the *prospective litigant* effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28, *quoting Mitsubishi Motors*, 473 U.S. at 637 (emphasis added). Without question, individual arbitration of a TILA claim provides an effective remedy to a prospective litigant, without the necessity of any resort to a class action.

Congress itself does not believe that class action proceedings are necessary to vindicate the rights of prospective litigants. In 1980, Congress enacted Pub. L. 96-221, §615(a)(1), amending Section 130(a)(2)(B) of TILA, 15 U.S.C. §1640(a)(2)(B). Prior to the amendment, the maximum recovery of statutory damages in a single class action was limited to the lesser of $500,000 or 1% of the creditor's net worth.[7] After the amendment, this same

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[7] In both individual and class actions, consumers have the right to any actual damages they can prove, in addition to

limitation was extended to a "series of class actions arising out of the same failure to comply by the same creditor."[8] Accordingly, Congress has effectively denied all consumers who are not included in the class that first recovers the available relief the opportunity to utilize class action procedures to obtain statutory damages. *See Turner v. Beneficial Corporation*, 67 F. Supp. 2d 1325, 1330 (M.D. Ala. 1999) ("[B]ecause the Defendants have already paid the statutory maximum in statutory penalties to a class of plaintiffs pursuant to the state court settlement approved by, enforced, and affirmed upon review by the state courts, [plaintiff] may not proceed on her class claims for statutory damages for the same TILA violation in this court."). In doing so, Congress clearly recognized that TILA's individual remedies are fully adequate to compensate consumers.

In an individual proceeding, TILA's civil liability provision specifically requires the award of: (1) any "actual damage sustained by [a consumer] as a result of the failure [to comply with TILA]," 15 U.S.C. §1640(a)(1); (2) statutory damages equal to twice the finance charge, but not less than $100 or more than $1,000 (or $200 and $2,000 for closed-end loans, such as the loan to Respondent, secured by real property or a dwelling), 15 U.S.C. §1640(a)(2)(A); and (3) attorneys' fees and the costs of the

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statutory damages. As explained *infra* (pp. 13-14), it is virtually impossible to obtain actual damages in a class action because the issue of individual reliance destroys commonality, typicality and predominance.

[8] The situation where a creditor is subjected to multiple class actions alleging the same TILA violation is most likely to arise in the context of a series of state-wide class actions.

action (including, of course, arbitration fees), 15 U.S.C. §1640(a)(3).[9]

By mandating an award of attorneys' fees and costs of the proceeding to a prevailing consumer, Congress distinguished TILA claims (and claims under many other federal consumer credit statutes) from most common law claims, ensuring that individual TILA actions remain viable. In conformity with the statute, substantial attorneys' fees have frequently been awarded under TILA, even in the absence of actual damages. *See, e.g., Ex Parte Edwards*, 601 So. 2d 82 (Ala. 1992) (directing lower court to award $43,000 in attorneys' fees); *Ratner* ($20,000 attorney fee in case awarding minimum statutory damages of $100). *Cf. Johnson v. Eaton*, 958 F. Supp. 261, 264 (M.D. La. 1997) (award of $13,410, "nearly 27 times greater than the damage award," in a case under the Fair Debt Collection Practices Act (the "FDCPA"), a statute whose civil liability provisions were patterned after TILA's).

Time and again, courts have concluded that TILA rights can be enforced effectively in individual proceedings. *See, e.g., Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d at 632 (even though "Congress recognized class action suits as a useful way to enforce the TILA . . . [b]ecause Congress has not provided for a statutory right to pursue class actions under the TILA, and because there are alternative means to bring suit thereunder, this court does not find that the TILA amounts to a 'congressional command' to preserve class action suits at the expense of the FAA. See *McMahon*, 482 U.S. at 226."); *Ratner* (concluding that an individual action was superior to a class proceeding);

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[9] In the proceedings below, either the Eleventh Circuit ignored TILA's command that a prevailing consumer is entitled to the costs of the proceeding or it assumed, incorrectly and without analysis, that this substantive right would not be available in arbitration.

*Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D.D.C. 1973) (because "an individual plaintiff will recover a minimum of $100, plus attorneys' fees and costs . . . the incentive offered by a class action is not necessary to enforce the provisions of the Act").

While unnecessary to support arbitration of TILA claims, we note that individual actions will frequently be superior to class actions in enforcing a prospective litigant's rights under the statute.[10] Actual damages are virtually impossible to prove in the context of a TILA

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[10] TILA class actions have been certified under Fed. R. Civ. P. 23(b)(3), suggesting that the courts in question viewed a class action to be superior to individual actions on the facts of the particular case. However, in determining arbitrability of a claim, the question under the FAA and this Court's precedent is not whether a class proceeding or an individual action is preferable in a given case. Such a rule would directly conflict with *Gilmer* because it would effectively preclude individual arbitration whenever a case, whether founded on an alleged statutory violation, breach of contract or tort, would otherwise be appropriate for class certification. It would also conflict with the Rules Enabling Act by elevating the procedural right to bring a class action over the substantive right to arbitration created by the FAA. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of the substantive claims"); *Marsh v. First USA Bank, N.A.*, Lodging, Exh. A, slip op. at 25 ("Emanating from Federal Rule of Civil Procedure 23, class actions are just that: procedural. Rules of procedure are established to facilitate the just resolution of substantive rights. As the Supreme Court has explained, courts should be 'mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right." ' *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997), *citing* 28 U.S.C. §2072(b). Accordingly, Plaintiffs are not entitled as a matter of right to proceed as a class.").

class action since a "plaintiff claiming actual damages must establish a causal connection between the inaccurate disclosure and his injury by demonstrating that he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere." *Adiel v. Chase Fed. S & L Assn.*, 630 F. Supp. 131, 133 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987).[11]

As a result of the need to prove individual reliance to establish a claim for actual damages, practically all courts that have considered the issue have refused to certify TILA classes seeking actual damages. *See, e.g., Barlow v. Evans*, 992 F. Supp. 1299, 1310 (M.D. Ala. 1997); *Hoffman v. Grossinger Motor Corp.*, 1999 U.S. Dist. LEXIS 4172 (N.D. Ill. Mar. 25, 1999); *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 12 (E.D. Mich. 1976).

Moreover, a consumer can almost always recover more statutory damages in an individual TILA action than in a class action. In a lawsuit against a large lender, with $50 million or more of net worth, the total class action recovery is capped at $500,000. With merely 5,000 class members, the maximum recovery of statutory damages by each class member would be only $100. This amount represents the *minimum* statutory damages in an individual proceeding. In many cases – for example, a

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[11] *See also* H.R. Rep. No. 104-193, §111 (1995) ("To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure."); 141 Cong. Rec. H9513-01, H9516 (daily ed. September 27, 1995) (statement of Rep. McCollum) ("To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure. A number of lawsuits have been filed in which plaintiffs have claims as actual damages the amount of the fees or charges that have been misdisclosed. This is not the meaning of actual damages. The proper meaning of damages is discussed in [*Adiel*].").

typical credit card program – there may be tens of thousands or even millions of class members. Thus, the prospect of a meaningful recovery for a prospective litigant in a TILA class action may be virtually nonexistent. In the words of one court:

> [I]f this class action suit went to trial and resulted in the maximum $500,000 cash award available under the [Consumer Leasing Act, a part of TILA], each class member would be entitled to less than one dollar of the total settlement. . . . Each class member would unquestionably fare better by bringing an individual action . . . [because] an individual plaintiff would be entitled to a *minimum* of $100 and a maximum of $1,000. . . . This recovery is substantially greater than the de minimus recovery that the class member would receive under §1640's $500,000 damages cap.

*Clement v. American Honda Finance Corp.*, 176 F.R.D. 15, 23-24 (D. Conn. 1997).

In *Lewis v. Jesse L. Riddle, P.C.*, 1998 U.S. Dist. LEXIS 20465 (W.D. La. Nov. 18, 1998), an FDCPA case, the court noted that several courts have certified class actions despite the argument that each class member could obtain more in an individual lawsuit. Nevertheless, the court held that an individual proceeding was superior to a class action. It observed:

> Concerns about equity and the fair administration of justice must extend beyond this single case. The certification of this class action is guaranteed to result in substantial delays in the resolution of the merits of other cases in this division. This court has experienced its share of class actions, each of which has consumed countless hours of conference, courtroom and consideration time. Undoubtedly, similar efforts would have to be put into this case. After it is all

> said and done several people who wrote bad checks will each receive a check that might be enough to buy lunch. Will they feel vindicated? More likely, they will be angered at the fact that the attorney's fees at issue are thousands of times the amount of their paltry compensation.

*Id.* at *24-*25.

Nor is the right to bring an individual lawsuit under TILA merely theoretical. This Court has encountered individual TILA cases on a number of occasions. *See, e.g., Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *American Express Co. v. Koerner*, 452 U.S. 233 (1981); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Mourning v. Family Pubs. Serv.*, 411 U.S. 356 (1973).

Moreover, according to a May 15, 2000 computer search of the CaseStream® database, 167 TILA cases, of which only 22 were class actions, were filed in the federal courts from January 1, 2000 through May 15, 2000 and 539 TILA cases, of which only 44 were class actions, were filed in the federal courts in 1999. Lodging, Exh. B. These figures may significantly understate the actual volume of individual TILA litigation since CaseStream search results do not include TILA claims: (1) filed under a civil docket sheet that labels a non-TILA claim as the principal claim in the case; (2) filed in state court, as permitted by 15 U.S.C. §1640(e);[12] (3) filed in one of the (small number

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[12] The "grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive [federal procedural] protections by filing suit in state court." *Rodriguez de Quijas, supra*, 490 U.S. at 482. Among the federal procedures a plaintiff

of) federal judicial districts that is not covered by CaseStream; (4) threatened but settled or withdrawn before a formal filing; (5) initiated as an arbitration rather than a judicial proceeding; or (6) filed as a counterclaim in a collection lawsuit.

In many cases without substantial actual damages, a consumer may conclude that the statutory damages available under TILA do not justify litigating a perceived technical violation of TILA. The consumer's decision to eschew litigation (or arbitration) is entirely voluntary, however, since Congress assured that the *opportunity* to vindicate an individual TILA claim for statutory damages and any actual damages remains viable. Of course, if individual judicial proceedings suffice to vindicate consumer rights, individual arbitration proceedings, with their relative simplicity, speed and cost-effectiveness,[13] provide an even better mode of enforcement.[14]

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may waive by filing a case in state court is the right to pursue a class action under Rule 23. *See, e.g., Marx v. Broom*, 632 So. 2d 1315, 1322 (Miss. 1994) (noting that Mississippi courts do not allow class actions).

[13] "[Alternative dispute resolution] has been used in the private sector for many years and has proven to be quicker, less costly, and more efficient than litigation in resolving disputes." H.R. Rep. No. 103-652, §309 (1994) (explaining the rationale for adoption of 12 U.S.C. §4806, providing for the use of alternative dispute resolution for disputes involving the federal banking agencies). *See also* Brief of American Bankers Association, American Financial Services Association, and Consumer Bankers Association as *Amici Curiae* in Support of Petitioners ("Trade Association Brief"), Section II.B.

[14] Not only can consumers obtain redress for TILA violations directly in individual proceedings, they can obtain relief indirectly by lodging complaints with the FTC or the appropriate federal banking agency. Each such agency provides convenient mechanisms for consumers to submit complaints in

## IV. Class Actions Are Not Needed To Deter Violations of TILA.

Under *Gilmer*, the proper focus in determining whether to enforce an agreement providing for arbitration of a statutory claim is whether the *prospective litigant* should be able to vindicate his or her substantive rights in arbitration. As explained above, consumers have an excellent opportunity to enforce their rights through individual arbitrations.

Respondent argued in her Brief in Opposition (Opp. 19-21), however, that TILA is incompatible with the arbitration clause in this case because enforcement of the clause would lessen the incentive for TILA compliance. This argument would apply equally – indeed, with greater force – to virtually any other statute that could give rise to class actions, including the Carriage of Goods by Sea Act, the ADEA, the federal securities laws, the federal antitrust laws and RICO. Of course, this Court has previously enforced agreements to arbitrate claims under each of these statutes. *See* n. 2, *supra*.

In *Gilmer*, 500 U.S. at 32, this Court emphasized that enforcement of the parties' arbitration agreement "will not preclude the [administrative agency] from bringing actions seeking class-wide and equitable relief." By the same token, enforcement of arbitration agreements for TILA claims will have no effect on the powerful deterrent force of agency and criminal enforcement mechanisms provided by TILA. These enforcement mechanisms make

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writing, by telephone or by e-mail. *See* Lodging, Exh. C (collecting web site materials of TILA enforcement agencies).

class actions unnecessary to ensure a high level of TILA compliance.[15]

A discovery by the FTC or a banking agency that a regulated institution may be in violation of TILA carries with it a direct and substantial risk to the institution. Under Section 108 of TILA, 15 U.S.C. §1607, the FTC and the federal banking agencies are afforded sweeping enforcement powers with respect to TILA violations committed by creditors within their jurisdiction. Violations of TILA by banking and savings institutions are treated as violations of Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §1818, and violations of TILA by most other creditors are treated as violations of the Federal Trade Commission Act (the "FTC Act").[16] 15 U.S.C. §§1607(a)-(c).

If a bank violates TILA, the appropriate agency may initiate cease and desist proceedings and obtain an order that requires the offending institution, among other

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[15] The Federal Deposit Insurance Corporation ("FDIC") reports that fully 96% of approximately 2,000 banks it examines had either satisfactory or outstanding legal compliance ratings at the end of 1998, leaving only 4% (or about 80) of these banks with less than satisfactory ratings. *See* FDIC, *1998 Annual Report* 34 (Aug. 1999). Lodging, Exh. D. Significantly, the FDIC formally required a total of 161 banks to reimburse consumers for TILA violations. This figure **doubles** the 4% of FDIC supervised banks that failed to achieve satisfactory or outstanding compliance ratings in 1998. *Id.* The Federal Reserve Board ("FRB") reports that 74% of the institutions it examined during the 1998 reporting period were in full compliance with Regulation Z (which implements TILA) and that 62% of the non-compliant institutions had only one to five violations. FRB, *85th Annual Report 1998* 223. Lodging, Exh. E.

[16] TILA compliance is also enforced in certain limited cases by the National Credit Union Administration, the Secretary of Transportation or the Secretary of Agriculture.

things, to: (1) cease and desist the unlawful conduct; (2) make restitution or provide reimbursement against loss in the case of unjust enrichment or reckless disregard for the law; (3) rescind the underlying agreement; or (4) take such other action as the agency determines to be appropriate.[17] 12 U.S.C. §1818(b). In addition, the agency can remove from office any institution-affiliated party who has directly or indirectly violated TILA – including any officer, director and employee, as well as any attorney or other independent contractor who has knowingly or recklessly participated in any TILA violation – and can prohibit such person from further participation in the affairs of any insured depository institution. 12 U.S.C. §§1813(u), 1818(e). The agency can also obtain civil penalties of not more than $25,000 per day during the continuation of any TILA violation that is reckless or part of a pattern of misconduct (or $5,000 per day for any other TILA violation).[18] 12 U.S.C. §1818(i).

Like the federal banking agencies, the FTC has authority to issue cease and desist orders and seek restitution in the event of a TILA violation by a creditor under its jurisdiction. 15 U.S.C. §§45, 1607(c). *See, e.g., In the Matter of Guild Mortgage Company*, 113 F.T.C. 1183 (1990). In addition, the FTC can commence a civil proceeding to obtain: (1) a civil penalty of up to $10,000 for each violation, Section 5(m) of the FTC Act, 15 U.S.C. §45(m); (2) an injunction and ancillary relief, Section 13(b) of the FTC Act, 15 U.S.C. §53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . .

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[17] The authority to order restitution, reimbursement, rescission and other appropriate action was created in 1978. See n. 6, *supra*.

[18] This authority was created in 1978. See n. 6, *supra*.

[including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages . . . " Section 19(b) of the FTC Act, 15 U.S.C. §57b(b). *See, e.g., United States v. National Financial Services, Inc.*, 98 F.3d 131, 139 (4th Cir. 1996) (affirming award of $500,000 in civil penalties pursuant to Section 5(m) of the FTC Act for a violation of the FDCPA); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991) (following *Singer* and affirming award of monetary equivalent of rescission).

The FTC's exercise of its power to redress violations of TILA and the FTC Act is illustrated by a recent consent decree obtained by the FTC in *United States v. Mazda Motor of America, Inc.*, Civ. Action No. SACV 99-1213 AHS (EEx) (C.D. Cal. Oct. 7, 1999). Lodging, Exh. F. This consent decree has its roots in 1997, when the FTC charged that the leasing advertising of Mazda and four other motor vehicle manufacturers did not comply with the Consumer Leasing Act (a part of TILA) and the FTC Act. Mazda and the other manufacturers consented to orders requiring clear and conspicuous disclosure of specified information in connection with any advertisement of payments due at lease inception. *In re Mazda Motor of America, Inc.*, FTC Docket No. C-3714 (FTC Feb. 6, 1997). Lodging, Exh. G. "The FTC found, however, that Mazda's television leasing ads continued making disclosures that were in small and unreadable print, offset by distracting images or sounds, or that appeared on the screen for too short a time." FTC Press Release dated Sept. 30, 1999, *Mazda to Pay $5.25 Million for Violating FTC*

*and State Orders Regarding Lease Advertisements* (the "Mazda Release"). Lodging, Exh. H. As a result of these practices, Mazda ultimately agreed to pay $4.05 million in civil penalties at the direction of the U.S. Department of Justice and a total of $1.2 million in fines and costs to 24 states. *Id.* The FTC observed: "This substantial penalty should not only deter future violations of the Commission's order by Mazda, but send a strong signal to everyone in the automobile industry – manufacturers, dealers and advertising agencies – that important leasing information cannot be buried in fine print." *Id.*[19]

In 1980, as part of the Truth in Lending Simplification and Reform Act, Congress added a critical additional weapon to the agency enforcement arsenal.[20] Pub. L.

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[19] Further examples of recent FTC enforcement activities under TILA include: (1) a consent order requiring a mortgage lender to pay $1.3 million of consumer redress and administrative costs; (2) consent judgments against seven subprime mortgage lenders *and their owners*, requiring consumer redress aggregating $572,500, imposing injunctive relief, requiring performance bonds and, in one case, banning any future involvement with high-cost home loans; (3) an ongoing lawsuit against a mortgage company in the Washington, DC area *and its owner*, seeking refunds of monies paid by consumers, disgorgement of improper gains, rescission of contracts and permanent injunctive relief; (4) orders imposing both general and specific requirements with respect to the leasing advertisements of two major computer manufacturers; and (5) consent agreements with six Philadelphia-area vehicle dealerships imposing general and specific requirements with respect to lease and credit advertisements. *See* January 6, 2000 letter from the Chairman of the FTC to the Director of the FRB's Division of Consumer and Community Affairs. Lodging, Exh. I.

[20] In the Truth in Lending Simplification and Reform Act, Congress simultaneously enhanced the enforcement powers of

96-221, §608(a), adding Section 108(e) of TILA, 15 U.S.C. §1607(e). Under Section 108(e) of TILA, whenever a creditor discloses a finance charge or APR that is materially inaccurate, the appropriate TILA enforcement agency is authorized to order restitution, based upon the difference between the actual and disclosed finance charges (or dollar equivalent thereof, in the case of an improper APR disclosure). Moreover, subject to limited exceptions, the agency is *required* to order restitution whenever the violation results from either a clear and consistent pattern or practice of violations (as will inevitably be the case for violations suitable for private class certification), gross negligence or willful violation intended to mislead the consumer. This powerful enforcement mechanism is *not* available to private litigants, who must show reliance under *Adiel* and its progeny in order to obtain actual damages and thus are not entitled to recover the difference between the disclosed finance charge and the actual finance charge (or the dollar equivalent thereof, in the case of an improper APR disclosure).[21]

The agencies have shown that they are fully prepared to exercise their restitution authority. The FRB reports that the FDIC, the Office of Thrift Supervision ("OTS") and the FRB required a total of 205 financial institutions to refund $2.3 million to consumers in 1998 because of

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the TILA enforcement agencies and limited the relief available in a series of similar TILA class actions, thereby placing greater relative reliance on TILA's administrative enforcement mechanisms.

[21] The TILA enforcement agencies can (and do) order class-wide relief without regard to the procedural requirements of Fed. R. Civ. P. 23 and the numerous difficulties and legal costs associated with implementing compliance with the Rule.

improper TILA disclosures. FRB, *85th Annual Report 1998* 223. Lodging, Exh. E.

On occasion, an enforcement agency has needed to enforce a restitution order in court. *See, e.g., Stutsman County State Bank v. FDIC*, 207 F.3d 464 (8th Cir. 2000) (failure to properly disclose processing fees ranging from $27 to $59 on 25,640 accounts resulted in required restitution of almost $1.5 million despite disclosure of fees in telephone script and/or written credit approval letters);[22] *First Nat'l Bank of Council Bluffs, Iowa v. Office of the Comptroller of the Currency*, 956 F.2d 1456 (8th Cir. 1992) (restitution order addressing improper APR disclosures affecting 691 discounted variable rate loans affirmed in part and reversed and remanded in part for further consideration of statute of limitations issues). Reported restitution cases and orders represent the "tip of the iceberg," however, since the TILA enforcement agencies ordinarily do not need to resort to formal restitution actions when they discover TILA violations. Rather:

> The agencies anticipate that most financial institutions will voluntarily comply with the restitution provisions of section 608 [sic] as part of the normal regulatory process. If a creditor does not voluntarily act to correct violations, the agencies will use their cease and desist authority to require correction. . . .

Federal Financial Institutions Examination Council, *Regulation Z: Joint Notice of Statement of Enforcement Policy*, 45 Fed. Reg. 48712, 48713 (July 21, 1980). *See, also*, Alan J.

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[22] Based on the $8,780,000 of equity capital reported by this bank to the FDIC as of December 31, 1999, Lodging, Exh. J, the **maximum** private TILA class action recovery against the bank would have been only $87,800.

Dombrow and Walter E. Zalenski, *The TILA Reimbursement Rules After the Rodash Amendments*, ABA Bank Compliance, p. 9 (March/April 1998) ("[T]he intent of the agencies is to lessen the adversarial nature of the process by explaining why reimbursement is necessary and requesting the institution to take voluntary action to avoid being told to do so under a C&D order. As a result, most reimbursement actions since 1980 have been made 'voluntarily.' "). Lodging, Exh. K.

Moreover, all of the federal banking regulatory agencies conduct regular examinations to determine whether the institutions within their supervisory jurisdiction are operating in a safe and sound manner and are complying with the Community Reinvestment Act (the "CRA"), 12 U.S.C. §§2901 *et seq.*, TILA and other applicable laws. The agencies then assign numerical safety and soundness and general compliance ratings and descriptive ("outstanding"; "satisfactory"; "needs to improve") CRA ratings on the basis of these examinations. An institution's noncompliance with TILA can adversely affect the ratings the institution receives on its safety and soundness examination for both management quality and overall quality, and could also adversely affect its CRA rating.

In adopting its "Uniform Financial Institutions Rating System," the Federal Financial Institutions Examination Council, a body composed of the Office of the Comptroller of the Currency (the "OCC"), FRB, FDIC, OTS and National Credit Union Administration, explained the significance of the institution's compliance with applicable law. 61 Fed. Reg. 67021 (Dec. 19, 1996). Under this rating system, each institution is assigned a composite safety and soundness rating based on an evaluation and rating of six essential components: (1) capital adequacy;

(2) asset quality; (3) management; (4) earnings performance; (5) adequacy of liquidity; and (6) sensitivity to market risk, with composite and component ratings being assigned numerical ratings from 1 (best) to 5 (worst). *Id.* at 67025. "[T]he management component is given special consideration when assigning a composite rating." *Id.* "The capability of the board of directors and management . . . to ensure . . . compliance with applicable laws and regulations is reflected in this rating." *Id.* at 67027. Top rated institutions, with composite 1 and 2 ratings, "are in substantial compliance with laws and regulations" while lower rated institutions, with composite 3 and 4 ratings, "may be in significant noncompliance with laws and regulations" *Id.* at 67026.

By the same token, non-compliance with the law, including TILA, also adversely affects an institution's CRA compliance rating. *See* 12 C.F.R. §25.28(c) (evidence of illegal credit practices adversely affects OCC's evaluation of bank's CRA performance); 12 C.F.R. §22.28(c) (same for FRB); 12 C.F.R. §345.28(c) (same for FDIC); 12 C.F.R. §563e.28(c) (same for OTS). Each of the federal banking agencies has adopted a regulation providing that an institution's record of CRA performance will be taken into account and may serve as the basis of denial for specified applications, including applications for: (1) a new charter or deposit insurance; (2) the establishment of a branch or the relocation of a home office or branch; (3) a merger, consolidation, branch acquisition or similar transaction; or (4) the acquisition of shares or assets of a regulated financial institution.[23] Moreover, adverse management, composite and/or CRA ratings can preclude a financial institution and its affiliates from exercising

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[23] 12 C.F.R. §25.29 (OCC); 12 C.F.R. §228.29 (FRB); 12 C.F.R. §345.29 (FDIC); 12 C.F.R. §563e.29 (OTS).

powers otherwise authorized by the recently enacted Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999). Section 4(l) of the federal Bank Holding Company Act (the "BHCA"), 12 U.S.C. §1843(l), enacted as part of the Gramm-Leach-Bliley Act, prohibits a bank holding company from conducting certain activities, directly or indirectly through subsidiaries, that are "financial in nature" (which includes under Section 4(k) of the BHCA, 12 U.S.C. §1843(k), insurance and securities underwriting; insurance agency activities from outside small towns; merchant banking; and other activities) if any insured depository institution subsidiary of such holding company is not "well managed" or has received in its most recent CRA examination a rating of less than satisfactory.[24] Similar prohibitions apply to any insured depository institution that seeks to undertake activities that are "financial in nature" through subsidiaries if the institution or any of its affiliated insured depository institutions receives a less than satisfactory CRA rating. *See* 12 U.S.C. §§24a, 1831w(a) and 1843(l)(2).

The reality and threat of agency enforcement actions by the FTC and the federal banking regulators, and the prospect of poor examination results, while fully sufficient of themselves to deter non-compliance with TILA, are by no means the only public mechanisms available to deter violations. State authorities also enforce TILA compliance, generally through state unfair trade practices or "mini-FTC" statutes that broadly proscribe unfair and deceptive acts and practices. For example, as reflected in

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[24] In order to be "well managed," an institution must receive a composite safety and soundness rating of 1 or 2 and at least a satisfactory rating for management. 12 U.S.C. §1841(o)(9).

the Mazda Release, Lodging, Exh. H, 24 states obtained $1.2 million of fines and costs arising from Mazda's alleged lease advertising violations. Also, the New York State Banking Department recently announced the settlement for $12 million of a case involving, among other things, alleged violations of the Home Ownership Equity Protection Act provisions of TILA. *Superintendent Announces Landmark Settlement with Lender* (Aug. 19, 1999). Lodging, Exh. L. By the same token, the New York Attorney General has warned New York automobile dealers that violations of TILA in the credit sale or lease of motor vehicles are considered "deceptive" practices that may give rise to enforcement actions. *New York State Attorney General's Office Advertising Guidelines for Auto Dealers*. Lodging, Exh. M.

TILA violations are further deterred by TILA's criminal liability provision. Under Section 112 of TILA, 15 U.S.C. §1611, any person who willfully and knowingly violates TILA is criminally liable and subject to a $5,000 fine, a year in prison or both. Moreover, TILA violations are deterred by the threat of delayed loan rescission, an individual remedy provided by TILA with respect to specified loans secured by the consumer's principal residence.[25] Under Section 125 of TILA, 15 U.S.C. §1635, consumers have the right to rescind these loans at any time within three years after loan closing if the creditor fails to provide materially accurate TILA disclosures. A valid rescission results in the creditor's loss of its security

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[25] *See James v. Home Constr. Co.*, 621 F.2d 727, 730-31 (5th Cir. 1980) ("the rescission remedy [is] a purely personal remedy"); *Jefferson v. Security Pac. Fin. Servs.*, 161 F.R.D. 63, 69 (N.D. Ill. 1995) ("Under Section 1635, individuals must choose to assert the right to rescind, on an individual basis and within individual time frames before filing suit").

interest in the dwelling and an obligation to refund *all* charges incurred by the consumer in connection with the loan (*e.g.*, interest, points, application fees, appraisal costs, title insurance premiums, etc.). Accordingly, this remedy can result in draconian potential exposure to creditors,[26] providing creditors with a powerful additional incentive to ensure that TILA violations do not infect their home loan portfolios.

In sum, despite Respondent's protestations in her Brief in Opposition to the contrary, the unavailability of class action relief under a consumer arbitration agreement does not conflict with the purposes of TILA by eliminating or even significantly reducing the incentive for creditors to comply with the statute.[27]

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[26] For a home loan of $100,000, originated for three points and $500 of additional loan costs at a 7% interest rate, the amount in controversy if the consumer purports to rescind the loan on the eve of its third anniversary would approximate $24,500 ($3,000 in points; $500 of additional loan costs; and approximately $21,000 of interest, ignoring the effects on interest charges of any principal amortization). Clearly, this type of exposure, when applied to more than a handful of loans, can lead to catastrophic liability.

[27] In refusing to enforce arbitration of a TILA claim based on their conclusion that the elimination of class action exposure would eliminate any meaningful incentive for creditors to comply with TILA, the district courts in *Lozada v. Dale Baker Oldsmobile*, 2000 U.S. Dist. LEXIS 4122 (W.D. Mich. Mar. 27, 2000), and *Johnson v. Tele-Cash*, 82 F. Supp. 2d 264 (D. Del. 1999), did not mention, let alone analyze, the effect of TILA's administrative and criminal enforcement provisions. Nor did either court consider economic and other mechanisms promoting TILA compliance. Such mechanisms would include, without limitation, creditor concerns about: (1) the potential loss of customer goodwill and reputation (*see* the Trade Association Brief, Section II.C); and (2) the necessity of

## CONCLUSION

For the foregoing reasons, this Court should hold that the unavailability of class action relief neither vitiates nor excuses the enforcement of an agreement to arbitrate a TILA claim.

Respectfully submitted,

ALAN S. KAPLINSKY*
DAVID H. PITTINSKY
JEREMY T. ROSENBLUM
THOMAS B. ROBERTS
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

*Counsel of Record*

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demonstrating TILA compliance to potential loan purchasers, agencies rating potential loan securitizations and entities considering corporate mergers with or acquisitions of the creditor.

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IN THE
# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHRISTOPHER R. LIPSETT
*Counsel of Record*
ERIC J. MOGILNICKI
TODD ZUBLER
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

*Counsel for Amici Curiae*

June 8, 2000

40PP

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IN THE

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No. 99-1235

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,

*Petitioners,*

v.

LARKETTA RANDOLPH,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of the Petitioners, Green Tree Financial Corp.—Alabama and Green Tree Financial Corporation. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, or their counsel.

## STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes -- money center banks, regional banks and community banks. ABA members hold approximately 90 percent of the domestic assets of the United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance and concern to banks or consumers of banking services. Some ABA members include arbitration agreements in their consumer loan documents and deposit contracts.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently owned consumer finance offices to the nation's largest financial services, retail and automobile companies. AFSA's membership includes national and state banks that operate multi-state consumer credit programs. Some AFSA members include arbitration agreements in their consumer loan documents.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity and education finance, bank sales of investment products, small business services and community development. Some CBA members include arbitration agreements in their consumer loan documents and deposit contracts.

## QUESTIONS PRESENTED

This brief addresses question two in the petition for a writ of certiorari.

## SUMMARY OF ARGUMENT

Members of the *amici* organizations rely upon arbitration to resolve disputes with their customers in a fair, inexpensive, and efficient manner. These banks and other financial institutions therefore rely on the enforceability of arbitration agreements in this Nation's courts, in keeping with the strong federal policy in favor of arbitration embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

This Court has repeatedly held that the FAA establishes a federal policy in favor of arbitration, and that therefore a party seeking to invalidate an arbitration agreement has the burden of establishing that the agreement should not be enforced. The Eleventh Circuit, however, has ruled that an arbitration agreement is unenforceable unless there is a specific demonstration of the affordability of arbitration. This decision undermines the policy in favor of arbitration, and creates an inappropriate burden upon a party seeking to enforce an arbitration agreement.

Placing the burden on the party opposing arbitration is logical and workable. It recognizes that an arbitration agreement is a contract or a part of a contract, and that a party seeking to invalidate a contract bears the burden of establishing that a contract is invalid. This rule conserves judicial and litigant resources: it is much more efficient to require that the objecting party identify the flaws in the agreement, rather than requiring that another party prove the agreement is flawless.

Here, the proper application of the burden would have delayed or avoided the need for judicial involvement. Instead of entertaining conjecture, the Eleventh Circuit

should have required that the plaintiff find out the exact fees it would be charged to proceed with arbitration, demonstrate why the fee-shifting provisions of the Truth-in-Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, and Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f, did not provide adequate protection, and establish that the costs associated with arbitration rendered the agreement to arbitrate unenforceable.

The presumption in favor of arbitration is based on sound principle and is fair to consumers. Congress and empirical studies have found that arbitration is an inexpensive, efficient, and fair means of resolving disputes. Economic theory also supports the presumption in favor of arbitration because enforcing arbitration agreements allows contracting parties and society to capture the benefits and efficiencies that those agreements allow.

Finally, the Court of Appeals erred because, under the FAA and contract law, any doubts regarding the validity of terms of an arbitration agreement should have been resolved by interpreting the agreement to uphold its validity.

For all of these reasons, the Court of Appeals' judgment should be reversed.

## ARGUMENT

### I. THE ELEVENTH CIRCUIT'S INVALIDATION OF THE PARTIES' ARBITRATION AGREEMENT WAS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT.

Congress adopted the FAA to ensure that written agreements to arbitrate are "valid, irrevocable, and enforceable" in contracts involving interstate commerce. 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "[T]he basic purpose of the [FAA] is to overcome courts'

refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (citation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

In keeping with the FAA, this Court has emphatically rejected "the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989) (internal quotations and citations omitted). "[G]eneralized attacks on arbitration," *Gilmer*, 500 U.S. at 30, and the "suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . [have] fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes," *Rodriquez de Quijas*, 490 U.S. at 481 (citation omitted). Instead, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (citations omitted).

The FAA places the burden on the party seeking to invalidate an arbitration agreement. "The Arbitration Act, standing alone . . . mandates enforcement of agreements to arbitrate statutory claims." *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987). A party seeking to avoid that mandate must prove that there are adequate grounds for doing so. For example, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227 (citation omitted). Similarly, the burden is on parties seeking to invalidate their arbitration clauses on the grounds that arbitrators are biased. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption" that a forum will not find competent and unbiased arbitrators); *see also Gilmer*, 500 U.S. at 30 (same).

The same burden applies to parties that claim that arbitrators might fail to follow the law. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *McMahon*, 482 U.S. at 232. Following this reasoning, Courts of Appeals have placed the burden on parties who allege that the fees and costs for arbitration are so high that they prevent plaintiffs from vindicating their statutory rights through arbitration. *See Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999).

The plaintiff below sought to invalidate her arbitration agreement mainly on the ground that the costs of arbitration would prevent her from vindicating her statutory rights under the TILA. *See* Br. for Appellant at 34. However, the plaintiff did not establish that she was facing excessive fees or costs that prevented her from arbitrating her dispute. Indeed, plaintiff could only speculate about whether the fees and costs would prevent her from vindicating her statutory rights because she did not even attempt to agree on an arbitrator with the defendants, as she was required to do by her contract. *See* Pet. App. at 57a.[2] In light of plaintiff's failure, the Eleventh Circuit's decision to invalidate the arbitration agreement was inconsistent with the FAA and this Court's decisions.

In place of proof from the plaintiff, the Eleventh Circuit offered its own "serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses." Pet. App. at 17a-18a. The arbitration agreement itself raised no such concerns -- the relevant provision simply left the issue to be resolved by the parties at a later date in accordance with the law underlying plaintiff's statutory claims, when the parties jointly agreed on an arbitrator. *See* Pet. App. at 57a. But the

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in this case.

Eleventh Circuit noted that fees and costs "*may* curtail or bar a plaintiff's access to the arbitral forum," *see* Pet. App. at 17a (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)) (emphasis added), and then declared that the arbitration agreement would therefore defeat the remedial purpose of the TILA, *see* Pet. App. at 18a. This imposition of judicial distrust of the parties' contracted-for arbitration structure constituted an improper shifting of the burden to the party seeking to enforce the arbitration agreement.

The Eleventh Circuit's reasoning was not made more appropriate by the fact that the parties here entered into their arbitration agreement before their dispute arose. Such pre-dispute agreements are commonplace. As a general matter, arbitration favors all parties who seek a speedy and inexpensive method to resolve their disputes. It is on that basis that parties jointly agree to enter into a general pre-dispute arbitration agreement. After a particular dispute arises, however, one side or the other may decide it would be advantageous (e.g., for settlement leverage or other tactical reasons) to employ judicial procedures, instead of arbitration, for resolving that particular dispute. But the arbitration agreement was made a *contract*, intentionally binding the parties, and is not just an expression of expectations. And a party's inability to foresee whether circumstances would later make judicial procedures more desirable for a particular dispute than arbitration are not in principle any different from (and in the vast majority of cases less consequential than) a party's inability to foresee that she might benefit, say, from a floating interest rate rather than a fixed one. Indeed, the FAA is explicit that a pre-dispute arbitration agreement is equally binding as a post-dispute agreement. *See* 9 U.S.C. § 2 ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ." (emphasis added)).

If the parties in this case had entered into the identical arbitration agreement *post-dispute*, it clearly would be fully enforceable. Plaintiff's arguments about the potential costs of arbitration constituting a forfeiture of her rights under the TILA, or any of the other arguments she advanced in the courts below for avoiding arbitration, would be obviously unpersuasive grounds for disregarding an arbitration contract she had just made. Considered as a post-dispute arbitration agreement, for example, it would surely have been permissible for her to enter into an agreement to arbitrate that did not expressly address how costs would be allocated, but gave her the opportunity to veto an arbitrator whose costs were unacceptable. And, as noted above, the fact that this arbitration agreement was entered into *pre-dispute* does not justify any different analysis or conclusion under the FAA.

## II. PLACING THE BURDEN ON THE PARTY SEEKING TO INVALIDATE ITS AGREEMENT TO ARBITRATE IS LOGICAL, WORKABLE, AND FAIR.

As noted above, both the FAA and this Court's precedents place the burden on the party seeking to invalidate an arbitration agreement. This placement of the burden is logical, workable and justified. It is a burden that is supported by general principles of contract and evidence, and justified as a matter of judicial procedure and common sense. In addition, empirical data and economic theory alike support placing the burden on the party opposing arbitration.

### A. Placing the Burden on the Party Opposing Arbitration Is Logical and Workable.

#### 1. *Placing the Burden on the Party Opposing Arbitration Is Consistent with Standard Contract Law.*

The FAA requires that courts enforce arbitration agreements "like other contracts." *Volt Info. Sciences, Inc. v.*

*Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (FAA places arbitration agreements "upon the same footing as other contracts" (internal quotations and citations omitted)). Thus, courts must apply ordinary state contract law to arbitration agreements. *See Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987). Under ordinary contract law, a party seeking enforcement of a contract must first demonstrate the existence of a contract. *See, e.g., Sims v. Blanchris, Inc.*, 648 F. Supp. 480, 484-85 (S.D.N.Y. 1986). After that has been shown, however, "[a] party asserting the invalidity of a contract has the burden of proving such invalidity." *Smith v. Odell*, 108 So. 400, 401 (Ala. Ct. App. 1926); *see also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("[A] general rule of construction presumes the legality and enforceability of contracts." (citation omitted)). For example, a party that wants a contract declared unconscionable has the burden of establishing unconscionability. *See Ex parte Napier*, 723 So. 2d 49, 53 (Ala. 1998). Similarly, it is appropriate to place the burden of establishing invalidity on a party seeking to avoid an arbitration agreement.

### 2. *Placing the Burden on the Party Opposing Arbitration Conserves Judicial and Litigant Resources.*

Sound reasons underlie the rule that the burden is on the party seeking to avoid her arbitration agreement to establish that it is invalid, rather than placing a burden on the party seeking to enforce the agreement to establish that there are no grounds for challenge. It would be extremely burdensome and wasteful -- and contrary to the Congressional purpose of establishing arbitration as an expeditious alternative to litigation -- to require that the party seeking to enforce the arbitration agreement develop and proffer evidence and legal grounds in support of the propriety of every aspect (fee structure, arbitrator selection, location of proceedings, rules

of procedure and evidence, etc.) of the agreement. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1503 (1999) ("[I]t would be inefficient to require [one party] to anticipate and produce evidence contravening the indefinite number of defenses that [the other party] might plead in a given case."); Kevin W. Saunders, *The Mythic Difficulty in Proving a Negative*, 15 Seton Hall L. Rev. 276 (1985) (explaining that courts should place burden of production on the party that can resolve the issue by presenting less evidence).

Furthermore, the party objecting to enforcement of the arbitration agreement should bear the burden because that party often will possess relevant information that is uniquely within its control. In the arbitration context, a party claiming that arbitration is improper will typically be in the best position to explain what prevents her from obtaining relief. For example, in cases where parties have asserted that arbitration is improper because they cannot afford it, courts have required the parties to document the fees and their financial condition. *See, e.g.*, *Dobbins*, 198 F.3d at 717; *Rollins, Inc. v. Foster*, 991 F. Supp. 1426, 1438-39 (M.D. Ala. 1998). When matters are peculiarly within one party's knowledge, it is routine to place a presumption against that party on the relevant issue until it offers evidence to the contrary. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *Dorsey v. Dorsey*, 66 So. 2d 135, 139 (Ala. 1953); Posner, *supra*, at 1502-03.

This allocation of burden is especially apt here. The arbitration agreement that plaintiff and Green Tree adopted did not expressly address the costs associated with the arbitration proceeding, but it did give plaintiff the opportunity to veto an arbitrator who was unacceptable to her. *See* Pet. App. at 57a. There is no reason why plaintiff, in light of her burden to establish the invalidity of the arbitration agreement, should not have been required to establish that she was unable to satisfy her concerns about

costs by rejecting any arbitrator whose costs were unacceptable.

### 3. *Arbitration Fees and Costs Would in Any Event Be Awarded to a Prevailing Plaintiff in this Case, in Accordance with the TILA and ECOA.*

Placing the burden on the party seeking to avoid arbitration is particularly appropriate here, where plaintiff's claims are under the TILA and ECOA. Both the TILA and ECOA explicitly provide that "in the case of any successful action . . . the costs of the action" shall be awarded to a prevailing plaintiff. 15 U.S.C. § 1640(a)(3) (TILA); *id.* § 1691e(d) (ECOA). As the Eleventh Circuit acknowledged, when there is evidence that "most successful arbitral claimants were awarded fees and costs," such fees and costs cannot serve as grounds for invalidating an arbitration agreement. Pet. App. at 19a (citing *Rosenberg*, 170 F.3d at 15-16); *see also Wells v. Chevy Chase Bank F.S.B.*, No. 24-C-99-000202 (Cir. Ct. for Baltimore City Aug. 16, 1999) (order compelling arbitration). The arbitration clause in this case requires that the arbitrator enforce the law, and the relevant law here includes fee-shifting requirements. *See* Pet. App. at 57a.[3] Therefore, even if the Eleventh Circuit's speculation about the potential for high arbitration costs and fees was appropriate -- which it was not -- the presumption in

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[3] The rules of the major arbitration forums also explicitly require that arbitrators follow the statutory law. *See* National Arbitration Forum ("NAF") Code of Procedure, Rule 20A, *available at* <http://www.arb-forum.com/library/code.html> [hereinafter NAF Code R.]; American Arbitration Association ("AAA"), Rules/Procedures, Arbitration Rules for the Resolution of Consumer-Related Disputes, Rule 13, *available at* <http://www.adr.org> [hereinafter AAA Consumer Disputes R.]; JAMS/Endispute Financial Services ("JAMS/Endispute") Arbitration Rules and Procedures, Rule 20(c) [hereinafter JAMS/Endispute Rule].

favor of arbitration still applies here because a prevailing plaintiff will recover any costs and fees through arbitration.[4]

If an excessive fee actually materialized, and was improperly imposed on plaintiff, she would have access to the courts to address that problem. Parties that face such an obstacle may challenge the agreement on this ground *after* they have attempted to bring a claim in arbitration. *See, e.g.*, *Dobbins*, 198 F.3d at 717 (requiring the party opposing arbitration to attempt to arbitrate the claim and prove that he or she cannot afford the fees in question);[5] *see also Rosenberg*, 170 F.3d at 15-16 (holding that any objection to costs of arbitration could be raised with court reviewing arbitration award); *Howard v. Anderson*, 36 F. Supp. 2d 183, 186 (S.D.N.Y. 1999) (upholding arbitration agreement because plaintiff had not demonstrated that excessive fees had been demanded); *Walker v. MDM Servs. Corp.*, 997 F. Supp. 822, 826 (W.D. Ky. 1998) (upholding arbitration agreement because plaintiff never proved she would be required to pay a fee); *Rollins*, 991 F. Supp. at 1439 (upholding arbitration agreement because plaintiff "failed to show she is effectively locked out" of arbitration). At no time should a court indulge, as the Eleventh Circuit did here, "an assumption that the proof would support a 'worst case' scenario." *Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409, 415 (Ala. 1999) (upholding an arbitration agreement in the face of challenges based on excessive fees).[6]

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[4] A prevailing plaintiff would also recover "a reasonable attorney's fee" pursuant to the TILA and the ECOA. *See* 15 U.S.C. § 1640(a)(3) (TILA); *id.* § 1691e(d) (ECOA).

[5] Indeed, the Eighth Circuit Court of Appeals in *Dobbins* suggested that if the plaintiff did prove that the arbitration costs in question were so excessive that they prevented access to arbitration, the district court should accept the defendant's offer to pay these costs. *See Dobbins*, 198 F.3d at 717 & n.4.

[6] *See, e.g.*, *Dobbins*, 198 F.3d at 717; *Rosenberg*, 170 F.3d at 16; *Howard*, 36 F. Supp. 2d at 186; *Walker*, 997 F. Supp. at 826; *Rollins*, 991

### 4. *Any Potential Defects in Arbitration Proceedings Are Subject to Correction through Judicial Review.*

Placing the burden on the party seeking to avoid arbitration is also appropriate because post-arbitration judicial review can remedy defects in the arbitration process when appropriate. The FAA provides for court review of an arbitration award for manifest disregard of the substantive law. *See* 9 U.S.C. § 10(a)(4). This Court has held that "such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; *see also Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232). Here, the Eleventh Circuit should have recognized that if the arbitrators failed to shift fees and costs in keeping with the TILA and ECOA, plaintiff would have had an opportunity to seek judicial review of that decision.

Similarly, if an individual arbitrator proves to be biased or improperly excludes evidence, the Federal Arbitration Act provides for judicial review. *See* 9 U.S.C. § 10(a)(2), (3) (permitting courts to vacate arbitration awards "[w]here there was evident partiality or corruption in the arbitrators" or "[w]here the arbitrators . . . refuse[ed] to hear evidence pertinent and material to the controversy"); *see also Gilmer*, 500 U.S. at 31 (reviewing the standards for determining arbitrator bias). As an initial matter, courts must "decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634. But if a party proves that an arbitrator is partial, the court may appoint a new neutral arbitrator to hear the dispute. *See* 9 U.S.C. § 5 (permitting courts to appoint a new arbitrator "if for any . . . reason there

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F. Supp. at 1438-39. *Cf. Gilmer*, 500 U.S. at 30 (declining to presume that arbitration forum will not find competent and unbiased arbitrators); *McMahon*, 482 U.S. at 232 (declining to presume that arbitrator will not follow law).

*shall be a lapse in the naming of an arbitrator*"); *see also Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896 (2d Cir. 1997) (appointing a neutral arbitrator).[7]

### B. Placing the Burden on the Party Opposing Arbitration Is Justified Because Arbitration Works Well for Consumers.

Congress has expressly recognized arbitration's benefits to individuals, and empirical studies support Congress's faith in arbitration. Thus, before closing the door on the efficiencies and other benefits of arbitration, it is perfectly appropriate that courts put to the test any party that opposes enforcement of an arbitration agreement.

#### 1. *Congress Has Recognized that Arbitration Helps Consumers.*

"Congress, when enacting [the FAA], had the needs of consumers . . . in mind," *Allied-Bruce Terminix*, 513 U.S. at 280 (citation omitted), and was guided by the success of arbitration in the United States. The Senate Judiciary Committee Report prepared in connection with the FAA noted that "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to . . . business . . . as well as to individuals." S. Rep. No. 68-536, at 3 (1924). The Report went on to document the fact that arbitration took weeks where litigation took years; that the costs of arbitration were "trifling" compared to the expense of litigation; and that the participants in arbitration -- "winners and losers alike" -- were satisfied with the arbitration process. *Id.*

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[7] Such cases are rare because, as discussed below, arbitration forums have detailed rules that eliminate the potential for excessive fees or bias. *See infra* Part II.B.

Congress has consistently reiterated its strong belief in the benefits of arbitration. In 1982, a House of Representatives Report stated that "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling . . . ." H.R. Rep. No. 97-542, at 13 (1982); *see also Allied-Bruce Terminix*, 513 U.S. at 280. As recently as last year, the federal policy favoring arbitration was reaffirmed by Congress in the Y2K Act, which "encourage[s] . . . parties . . . to resolve disputes [relating to the millennium] . . . by alternative dispute mechanisms in order to avoid costly and time-consuming litigation." Y2K Act, Pub. L. No. 106-37, § 2(b)(3), 113 Stat. 185, 187 (1999) (codified at 15 U.S.C. §§ 6601-6617). Congress justified the use of arbitration by citing the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation," *id.* § 2(a)(3)(B)(iv), adding that "small businesses and individuals . . . already find the legal system inaccessible, because of its complexity and expense," *id.* § 2(a)(5). *Accord id.* § 2(a)(3)(B)(iii).

### 2. *Arbitration Is Inexpensive, Fast, and Fair.*

Congress's faith in the benefits of arbitration is well justified. First of all, arbitration is demonstrably inexpensive, and therefore "helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix*, 513 U.S. at 280 (citation omitted). The three major national arbitration agencies that hear consumer claims all offer small-dispute fee structures that compare favorably with the $150 filing fee for claims in federal court. *See* 28 U.S.C. § 1914(a). For example, the maximum filing fee for a consumer filing a claim valued at under $5000 before the National Arbitration Forum is $49. *See* NAF Code, Filing Fees, Fee Schedule.

Consumers filing claims of up to $15,000 pay a maximum filing fee of only $100. *See id.* The American Arbitration Association offers a similar fee structure for consumer claims. *See* AAA Consumer Disputes R., Administrative Fees ($125 arbitrator's fee for consumer disputes under $10,000). And the rules of JAMS/Endispute require that the fee structure agreed to by the parties "allocate costs in a way that does not preclude access by the consumer to the procedures." *JAMS Minimum Standards of Procedural Fairness Policy on Financial Services Arbitrations*, Standard 6, *available at* <http://www.jamsadr.com/arbitrationrules/index.htm>. Furthermore, each major national arbitration forum will waive its fees upon a showing of hardship. *See, e.g.*, NAF Code R. 45 (permitting the waiver of fees in hardship cases); JAMS/ Endispute R. 28(c); *see also Dobbins*, 198 F.3d at 717 (noting that AAA permits the waiving of fees in hardship cases and holding that the plaintiff should first seek the waiver before objecting in court to arbitration fees).

Arbitration also offers simple and informal procedures that allow an individual to pursue a claim without having to pay a lawyer to shepherd it through the complexities of our court system. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55, 56-57 (1998); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635, 646. Thus, "for smaller, simpler, more routine cases, it is hard to beat administered arbitration." Berthold H. Hoeniger, *Commercial Arbitration Handbook* § 3.10 (1st ed. 1990, rev. 1-1991). "Many consumer disputes, which often involve simple factual issues, can be resolved quickly and relatively cheaply through arbitration." Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331, 333 (1996) (citation omitted).

By contrast, litigation is often prohibitively expensive and prevents many individuals from obtaining relief. The *ABA Journal* reports that most lawyers will not even take cases worth less than $20,000. *See* Jill Schachner Chanen, *Pumping Up Small Claims*, A.B.A. J., Dec. 1998, at 18. Thus, it is not surprising that only one in three Americans agrees that taking a case to court is affordable and "[n]early nine of ten point to the costs of legal representation as the main barrier" to the adjudication of claims. Frank A. Bennack, Jr., *A Report on the National Survey* (May 14, 1999), *available at* <http://www.ncsc.dni.us/PTC/results/report.htm> (referring to *National Center for State Courts' 1999 National Survey: How the Public Views the State Courts* (June 28, 1999)).[8]

Arbitration is also faster than litigation. Although there are no major studies analyzing arbitration in the consumer context, the impact of arbitration in other settings demonstrates the benefits of arbitration for resolving individuals' claims. A study that compared employment claims filed through the AAA with similar claims filed in federal court found that, on average, arbitration resolved cases in half the time of litigation. *See* Maltby, *supra*, at 55. The relative speed of arbitration is not surprising. Cases are delayed in litigation because "the workload of the federal Judiciary has increased dramatically . . . [a]nd all indications are that . . . future caseloads will be larger and the demands on judicial resources even greater in the years to come." Administrative Office of the United States Courts, News

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[8] Class actions are not an effective remedy for these high litigation costs because the strict standards for class certification mean that most actions still must be pursued on an individual basis, where arbitration can be most helpful. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Institute for Civil Justice, Executive Summary 5 (1999), *available at* <http://www.rand.org/publications/MR/MR969.1.pdf> (finding that a large number "of cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money").

Release, Dec. 9, 1998, *available at* <http://www.uscourts.gov /Press_Releases/ 5yr.htm> (internal quotations omitted). As one commentator has noted, "[o]ur court systems, inundated by narcotics and other criminal cases and required to dispose of them quickly under federal and state speedy trial acts, must increasingly relegate ordinary civil litigation to second-class status." Hoeniger, *supra*, § 1.02 (citations omitted).

Importantly, the cost and time efficiencies of arbitration do not sacrifice fairness. A review of the nationally recognized arbitration forums demonstrates that each has explicit requirements designed to ensure that all appointed arbitrators be unbiased. *See, e.g.*, AAA Consumer Disputes R. 4; JAMS/Endispute R. 12; NAF Code R. 20. Arbitrators are generally former judges, practicing attorneys, or law professors, and must have many years of relevant experience. *See, e.g.*, NAF, *Arbitration Bill of Rights*, Commentaries to Principles 3-4 (1999), *available at* <http://www.arb-forum.com>; *see also* AAA Consumer Due Process Protocol, Principle 4, *available at* <http:// www.adr.org/education/ education/consumer_protocol.html>. These facts confirm this Court's observation that courts must "decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634.[9]

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[9] Arbitration forums also have additional protections against arbitrator bias. First, AAA and NAF require their arbitrators to disclose any circumstances that might preclude them from being impartial. *See* AAA Consumer Disputes R. 4(b); NAF Code R. 23. Second, all three major arbitration forums allow parties to challenge arbitrators for cause. *See* AAA Consumer Disputes R. 4(b); JAMS/Endispute R. 12(c); NAF Code R. 23(C). Indeed, the NAF also permits each party to make one peremptory challenge of arbitrators. NAF Code R. 21. Finally, arbitration forum procedures regulating recusal of an arbitrator are very similar to the judicial canon of ethics and federal statutes regulating the conduct of federal judges. *Compare* NAF Code R. 21, 23 *with* 28 U.S.C. § 455 *and* Canon 3E, Code of Judicial Conduct.

In addition to these protections against arbitrator bias, modern arbitration provides other procedures to ensure that the rights and interests of consumers are protected. The arbitration rules, for example, generally provide for discovery, including document production requests, interrogatories, and depositions. *See, e.g.*, AAA Consumer Disputes R. 8; JAMS/Endispute R. 13; NAF Code R. 29. Arbitrators may subpoena documents, and in some cases witnesses, for hearings, *see* AAA Consumer Disputes R. 8(a); JAMS/Endispute R. 16; NAF Code R. 30, and prior to a hearing, the parties are required to exchange information regarding anticipated witnesses and documents that they intend to use at trial, *see* JAMS/Endispute R. 13; NAF Code R. 31.

### 3. *Consumers Are Generally More Successful in Arbitration Than through Traditional Litigation in Vindicating Their Statutory Rights.*

An analysis of arbitration results demonstrates that consumers are more successful in vindicating their statutory rights through arbitration than through traditional litigation. Indeed, one study that compared the results in arbitration and litigation for similar cases found that individuals are four times more likely to prevail in arbitration. *See* Maltby, *supra*, at 46-48 (comparing Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189 (1997), with data from federal district courts); *see also* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication in Consumer Dispute Resolution*, ABA Special Comm. on Dispute Res. 332 (ABA 1983) (citing study finding that civil arbitration awards were virtually identical to verdicts rendered by judges and juries in similar cases). Similarly, NAF materials indicate that individuals win 70 percent of the claims brought against corporate entities before the NAF. *See Arbitration Bill of Rights*, *supra*, Principle 1 Commentary. And even when

individuals lose in arbitration, they typically feel that they nonetheless have had a fair hearing. One recent study of securities arbitration indicated that well over 90 percent of the participants in arbitration believed their cases were handled fairly. *See* Gary Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* at 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business).

Thus, arbitration should be seen as a catalyst -- not an obstacle -- for TILA and ECOA enforcement. Because arbitration has proven itself to be inexpensive, quick, and fair for individuals, it furthers goals of deterrence and compensation found in the TILA and ECOA by encouraging individuals to pursue claims under those statutes that they otherwise might have forfeited because of the expense of traditional litigation. By reducing the hurdle of litigation costs, arbitration "lead[s] to an increase in the number of victims who will litigate their claims, which in turn enhances [a] potential defendant's incentive to take care." *See* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. (forthcoming July 2000).[10]

### C. Placing the Burden on the Party Opposing Arbitration Is Supported by Economic Theory.

Economic theory also counsels that courts should enforce arbitration agreements. By enacting the TILA and ECOA, Congress enabled consumers to enforce their substantive rights under the statutes by litigation. The threat of litigation helps deter lenders from violating the substantive rights of borrowers. But the threat and reality of litigation

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[10] A draft version of this article was made available to *amici* by the editor of the *Supreme Court Economic Review*, Professor Larry Ribstein of the George Mason University School of Law. Precise page citations therefore were unavailable when this brief was filed.

also involve dispute resolution costs that are visited on borrowers and lenders alike, and credit costs reflect the costs of lawyers and litigation. Neither the TILA nor ECOA states or suggests that traditional litigation maximizes the difference between the benefits and costs of dispute resolution.

It is a basic principle of economic theory -- as well as a bedrock of the legal theory of contract -- that individuals and society may be made better off through contractual modifications of their legal rights. Arbitration agreements are such a contract. As demonstrated above, arbitration lowers the cost of resolving disputes, and may increase deterrence by removing cost-related barriers to initiating a dispute under the TILA or ECOA. Accordingly, parties may decide to agree to arbitration because "the difference between the deterrence benefit and the expected total litigation costs is greater than in the default court." Hylton, *supra*. Consumers will capture much of this gain in joint wealth because competition tends to align the price of a service with the cost of providing it. *See* Richard A. Posner, *Economic Analysis of Law* 8 (5th ed. 1998). This bargain benefits the larger society as well, since arbitration also saves government resources through fewer traditional court proceedings. *See* Hylton, *supra*. Agreements regarding other alternate dispute resolution mechanisms, such as mediation, have the same salutary effect on the parties and society, which is precisely why many courts have adopted mediation programs as a preferred alternative for dispute resolution.

The ability of parties to make agreements that increase their joint wealth is enhanced and safeguarded by placing the burden on parties opposing enforcement of arbitration agreements. The presumptions favoring arbitration are consistent with the famous Coase Theorem, which holds that parties will contract around inefficient allocations of property rights so long as the transaction costs of doing so are low. *See* R.H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ.

1 (1960). In the arbitration context, the Coase Theorem predicts that parties will contract around a system of litigation rights if litigation is inefficient and the transaction costs of agreeing to a more efficient alternative system of dispute resolution are low. *See* Hylton, *supra*. The transaction costs of agreeing to arbitration will remain low only so long as the courts continue to place the burden on parties that seek to invalidate arbitration agreements. Otherwise, the costs of litigating over whether the arbitration agreement is valid will erode or cancel altogether the benefits of such an agreement.

The benefits of arbitration agreements in the financial services context are substantial in part because eliminating traditional litigation does not significantly reduce the deterrent value of the relevant substantive law. In particular, the absence of class actions does not weaken the deterrence effect of the federal statutes involved here because class action litigation already plays a relatively small role in policing the practices of financial institutions. *See generally* Brief for Amicus Chamber of Commerce of the United States of America, Part IV. Congress has assigned the primary role in the enforcement of consumer finance laws to the federal banking agencies and the Federal Trade Commission ("FTC"). *See, e.g.*, 15 U.S.C. § 1607(a), (c) (TILA); *id.* § 1691c(a), (c) (ECOA). Financial institutions are regularly examined for compliance with numerous consumer laws and regulations by federal agencies, including the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation ("FDIC"). *See* 12 U.S.C. § 481; *see also* Board of Governors of the Federal Reserve System, *85th Annual Report* 220-24 (1998), *available at* <http://www.federalreserve.gov/boarddocs/RptCongress/annual98/>. In addition, each of the federal agencies has established consumer complaint divisions that investigate consumer complaints. Violations of law identified in this way can lead to the initiation of an

enforcement action against the institution to compel compliance and to provide restitution to consumers where appropriate. In 1998, FDIC examination, supervision, and enforcement actions alone resulted in the reimbursement of over $1 million to 31,222 consumers for violations of the TILA by 161 FDIC-supervised banks.[11] The FTC also engages in enforcement activities that protect consumer rights in the area of consumer credit.[12] Alongside these federal agencies, state attorney generals and state agencies also engage in the enforcement of consumer rights.[13] Consumers can rely on these other forces -- together with the threat of arbitration -- to maintain deterrence against an institution's misbehavior.

Furthermore, economic forces in the financial services industry maintain deterrence against firm misbehavior. *See*

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[11] *See* Federal Deposit Insurance Corporation, *1998 Annual Report* 34 (Aug. 1999).

[12] Federal Trade Commission, Letter to Dolores S. Smith, Director of Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System (Jan. 6, 2000). The FTC engages in enforcement activities under the Truth in Lending, Consumer Leasing, Equal Credit Opportunity, Fair Debt Collection Practices, and Electronic Fund Transfers Acts. For example, in *Fleet Finance, Inc. and Home Equity U.S.A., Inc.* ("Fleet Finance"), the FTC charged Fleet Finance in its complaint with violations of the TILA and Regulation Z, and deceptive practices in violation of the FTC Act. The final decision and order require Fleet Finance and its successor companies to pay $1.3 million for consumer redress and administrative costs. *See* Federal Trade Commission, *Fleet Finance and Home Equity U.S.A. Agree to Pay $1.3 Million Settling Charges of Deceptive Disclosures and Truth in Lending Violations in Fleet Finance Loans*, News Release, July 26, 1999, *available at* <http://www.ftc.gov/opa/1999/9907/fleet.htm>.

[13] For example, the Minnesota Attorney General recently filed a complaint against U.S. Bancorp, accusing the bank of violating the Fair Credit Reporting Act, consumer fraud, deceptive trade practices, and false advertising. U.S. Bancorp agreed to settle the lawsuit with payment of a $500,000 fine to the state, refunds to dissatisfied customers, and $2.5 million to charitable organizations. *See* Rochelle Olson, *U.S. Bancorp Settles Privacy Suit*, Seattle Times, July 1, 1999, at C2.

*generally* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990). For example, contracts between credit card issuers and their customers are what economists refer to as "relational" contracts, in which the ongoing, repeated economic interactions are disciplined significantly by nonlegal forces, such as the threat that the consumer will cancel her credit card. *See* Robert Cooter & Thomas Ulen, *Law and Economics* 213 (3d ed. 2000) ("The parties to long-run relations often rely upon informal devices, rather than enforceable rules, to secure cooperation."). The threat is quite real, because switching credit cards is easy. *See* Edmund Sanders, *Credit Card Choices Abound; Industry Consolidation Is Giving Customers More Options*, Fla. Times Union, May 31, 1998, at G6. Indeed, a small change in any element of a card agreement can cause thousands of customers to cancel their cards and send an issuer's stock tumbling. *See, e.g.*, Amber Veverka, *Bank Reputations Suffer from Poor Service; Curbing Complaints, Breakdowns Now a Top Priority*, Kan. City Star, Dec. 13, 1999, at B6. More generally, bank behavior is disciplined by the fierce competition for customers both among banks and between banks and other financial institutions. *See, e.g.*, *Suntrust Banks, Inc.*, 84 Fed. Res. Bull. 1115, 1120 (1998) (noting that credit card and mortgage origination markets are unconcentrated and contain numerous competitors).

Reputational constraints also deter lender misbehavior. *Cf.* Charny, *supra*, at 412-20. Information about the practices of financial institutions is made readily available by regulatory agencies and consumer watchdog organizations. The Federal Reserve, for example, publishes surveys of credit card rates and explanations of credit card terms, *see* <http://www.bog.frb.fed.us/pubs/shop/>, and magazines such as *Consumer Reports* and other private organizations provide information about banks' reputations and the lending terms they offer, *see, e.g.*, *The New Face of Banking*, Consumer Reports, June 2000, at 19; Joan Goldwasser, *Not-So-Fantastic Plastic*, Kiplinger's Pers. Fin. Mag., May 1, 1999,

at 44 (recommending credit cards based on, *inter alia*, interest rates, late fees, levels of customer complaints, and other terms); Bankrate.com, *available at* <http://www.bankrate.com>; HSH Assocs., Financial Publishers, *available at* <http://www.hsh.com>. In light of this scrutiny, no bank can afford to gain a reputation for exploiting customers. As the chief executive officer of one credit-card company faced with customer complaints recently lamented, "[i]t takes a short time to create a bad image . . . and a long time to recover." Ron Leuty, *Providian CEO Fights To Regain Respect*, S.F. Bus. Times, Mar. 24, 2000, at 1 (internal quotations and citation omitted).

Finally, market forces also benefit consumers who are entirely uninformed. The market for financial services involves mass, standardized transactions. In such a market, a firm cannot offer different terms to the informed consumer and the uninformed consumer. Therefore, the uninformed consumer benefits from terms that are included in transactions in order to attract the business of informed consumers. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Penn. L. Rev. 630, 638, 663-65 (1979). This process helps ensure that arbitration agreements are fair -- and so provides another basis for the presumption in favor of enforcing arbitration agreements.

Thus, Congress's determination that the burden should remain on the party who objects to the enforcement of these agreements is undergirded by both data and theory demonstrating that consumers and society benefit from the enforcement of arbitration agreements. As one economist summarizes, the benefit of arbitration to the contracting parties, together with "the added benefit that accrues when courts are relieved of the burden of managing socially undesirable litigation, suggests there should be a presumption in favor of enforcement." Hylton, *supra*.

## III. CONTRACT PRINCIPLES REQUIRE THAT DOUBTS SHOULD BE RESOLVED BY INTERPRETING AN ARBITRATION AGREEMENT TO UPHOLD ITS VALIDITY.

As discussed above, this Court's precedent interpreting the FAA provides two basic rules for interpreting arbitration agreements. First, courts must give "due regard . . . to the federal policy favoring arbitration." *Volt*, 489 U.S. at 475-76. Second, courts must in all other respects interpret arbitration agreements "like other contracts" by applying ordinary state contract law. *Id.* at 478. In this case, both the federal policy favoring arbitration and standard principles of contract law happily lead to the same conclusion -- that ambiguities and gaps in arbitration agreements do not preclude arbitration but rather should be interpreted to uphold the agreement's validity.

It is well-established that ambiguous contractual provisions should be construed to uphold their validity. "Under th[e] established rules of contract construction, where there is a choice between a valid construction and an invalid construction[,] the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms." *Homes of Legend, Inc. v. McCollough*, No. 1980921, --- So. 2d ---, 2000 WL 92255, at *4 (Ala. Jan. 28, 2000) (citations omitted). *Accord Walsh v. Schlecht*, 429 U.S. 401, 408 (1977); Restatement (Second) of Contracts § 203(a) (1979) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

The foregoing principle of contract construction operates in concert with a second principle -- that parties entering into a contract are presumed to accept all the rights and obligations imposed on their relationship by state or federal law. "[E]very contract is made with reference to existing

law[,] and every law affecting the contract is read into and becomes a part of the contract when made." *United Cos. Lending Corp. v. Autrey*, 723 So. 2d 617, 621-22 (Ala. 1998) (quoting *Barber Pure Milk Co. v. Alabama State Milk Control Bd.*, 156 So. 2d 351, 355 (Ala. 1963), quoting in turn *Bush v. Greer*, 177 So. 341, 341 (Ala. 1937)) (internal quotations omitted). *Accord General Motors Corp. v. Romein*, 503 U.S. 181, 188-89 (1992). Courts therefore interpret contracts containing gaps and ambiguities to encompass any relevant and necessary statutory or common law. *See, e.g., Board of School Comm'rs of Mobile County v. Hahn*, 22 So. 2d 91, 94 (Ala. 1945) (interpreting teacher's contract to include statutory tenure provision). Any gaps in the arbitration agreement here may be filled with terms from the FAA, TILA or ECOA.

These principles make sense. Courts, after all, cannot "presume that parties to a contract intended to violate the law." *Wolffe v. Perryman*, 9 So. 148, 148 (Ala. 1891). Furthermore, contracting parties should not be forced "to specify every right and duty that they want[] to make legally enforceable." *Selcke v. New England Ins. Co.*, 995 F.2d 688, 690 (7th Cir. 1993). Indeed, it is often the case that the transaction costs of making terms of a contract explicit are higher than the cost of the uncertainty from leaving the terms vague. *See* Steven Shavell, *Damage Measures for Breach of Contract*, 11 Bell J. Econ. 466, 468 (1980) ("[B]ecause of the costs involved in enumerating and bargaining over contractual obligations under the full range of relevant contingencies, it is normally impractical to make contracts which approach completeness."). Parties to an arbitration agreement, for example, may not spell out every last detail because such terms would make the agreement very long, and having more general arbitration clauses will make enforcement easier as the substantive law may change.

Thus, ordinary principles of contract law and the FAA's policy favoring arbitration require that any doubts about the

terms of an arbitration agreement be resolved by interpreting the agreement to incorporate whatever terms are necessary to permit arbitration. Parties who have agreed to arbitrate are presumed to have accepted the legal conditions that attach to arbitration, and courts should read those conditions into the contract so that the underlying agreement to arbitrate is effectuated, not nullified. In this case, where the agreement authorizes the arbitrator to exercise all authority under the relevant law but is otherwise largely silent about the specifics of arbitration, the Eleventh Circuit should have interpreted the arbitration clause in a way that allowed arbitration to go forward.

The Eleventh Circuit should have followed the example of the D.C. Circuit in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), where the court upheld an arbitration agreement even though it lacked a term the court found was statutorily required. In *Cole*, the D.C. Circuit held that employees cannot be required, as a condition of employment, to pay arbitrator fees incurred during the resolution of Title VII employment discrimination claims. The arbitration agreement in *Cole* was silent on the question of who would pay the arbitrator's fees. *Id.* at 1485. However, the D.C. Circuit did not therefore find (as the Eleventh Circuit did below) that the arbitration agreement was unenforceable because it "fail[ed] to provide the minimum guarantees required to ensure [plaintiff's] ability to vindicate her statutory rights," Pet. App. at 18a. Instead, the D.C. Circuit carefully considered the FAA's pro-arbitration policy, as well as District of Columbia contract law, and then interpreted the agreement's silence in a manner that preserved the agreement to arbitrate -- by construing the agreement to require the employer to pay all of the arbitrator's fees. Interpreted in that manner, the arbitration agreement was consistent with Title VII and "valid and enforceable." *Cole*, 105 F.3d at 1485-86.

The *Cole* approach should be applied whenever an arbitration agreement is silent or ambiguous. In this case, the Eleventh Circuit was presented with an arbitration agreement that did not state what the arbitration fees would be. Instead of conjuring up a parade of horribles and assuming the worst, the Court of Appeals should have interpreted the contract to provide for a reasonable fee arrangement consistent with the TILA and ECOA. Given such a plain choice between a construction that upholds an arbitration agreement and a construction that negates it, the Eleventh Circuit erred by choosing to invalidate the agreement.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

CHRISTOPHER R. LIPSETT
*Counsel of Record*
ERIC J. MOGILNICKI
TODD ZUBLER
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

*Counsel for Amici Curiae*

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In The

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP.-ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH,
*Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICUS CURIAE* OF CONSUMERS UNION OF U.S. IN SUPPORT OF THE RESPONDENT

Sally J. Greenberg*
Consumers Union of U.S.
1666 Connecticut Avenue
Suite 310
Washington, DC 20009
(202) 462-6262

Earl Lui
Consumers Union of U.S.
1535 Mission Street
San Francisco, CA 94103
(415) 431-6747

July 24, 2000

*Counsel of Record

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IN THE

# Supreme Court of the United States

No. 99–1235

GREEN TREE FINANCIAL CORP.-ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,

*Petitioners,*

v.

LARKETTA RANDOLPH,

*Respondent*

**Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICUS CURIAE* OF CONSUMERS UNION OF U.S. IN SUPPORT OF THE RESPONDENT

This *amicus curiae* brief is submitted in support of respondent. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, Consumers Union (CU) states that this brief was prepared in its entirety by CU. No monetary contribution toward the preparation or submission of this brief was made by any person other than CU.

## STATEMENT OF INTEREST OF AMICUS CURIAE

Consumers Union, publisher of *Consumer Reports* magazine, is a nonprofit, independent testing and consumer protection organization serving only consumers. Since 1936, CU has been a comprehensive source for unbiased reporting about goods, services, health, personal finance and other consumer concerns. CU engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government. CU is deeply concerned about the proliferation of pre-dispute mandatory binding arbitration clauses in consumer contracts, and the potential of these clauses to deprive consumers of common law and statutory rights and protections.

## SUMMARY OF ARGUMENT

The matter before this Court is whether the Eleventh Circuit properly held Green Tree's arbitration agreement to be unenforceable because its terms undermined Ms. Randolph's ability to protect her substantive rights provided by statute. This Court has reaffirmed time and again the strong federal policy favoring arbitration of disputes under the Federal Arbitration Act. In cases involving arbitration of statutory rights, this Court has affirmed an equally strong policy that parties do not forego their substantive rights under the Federal Arbitration Act. The Eleventh Circuit's holding in the present case is entirely consistent with this Court's decisions favoring arbitration, but mandating at the same time that the arbitration process not act as a barrier to the vindication of statutory rights.

Pre-dispute mandatory binding arbitration clauses are increasingly found in preprinted consumer contracts. This brief discusses the distinctions between adjudication and arbitration, highlighting the importance for consumers of making a knowing and informed choice to arbitrate. The public policy favoring arbitration does not require this Court to permit the imposition of unilateral pre-dispute mandatory binding arbitration on all customers, the trend in many consumer contracts. Consumers Union favors dispute resolution as an alternative to litigation when

it is mutually agreed on by the parties. We do not believe it is possible, however, for a consumer to make a knowing, intelligent, pre-dispute waiver.

The mandatory pre-dispute binding arbitration clauses that are proliferating in consumer contracts are buried all too frequently in fine print and written in impenetrable legalese. As a result, consumers may be unaware that they have waived the right to go to court. When presented with arbitration as an alternative to litigation, consumers will frequently find that the steep costs of arbitration or the inconvenience of traveling to an arbitration effectively bars them from seeking a remedy.

In the absence of a truly voluntary waiver of the right to go to court, consumers should be able to choose litigation for violations of consumer protection statutes. Consumers should have access to remedies expressly provided by statute, including punitive damages, and where appropriate, an injunction, or be able to join a class action. Consumer protection statutes contemplate those remedies, and in fostering the "private attorney general concept," they recognize the importance of effective private enforcement, all of which is undermined by mandatory arbitration.

The burden of mandatory arbitration clauses is likely to fall most heavily on consumers who are the least sophisticated, the poorest, and the least educated. This group has benefited, perhaps more than others, from judicial decisions enforcing statutory rights. Those decisions have also served to guide the public about permissible and impermissible practices. Because arbitration decisions are private, they cannot serve this important function.

Pre-dispute mandatory binding arbitration clauses also create the potential of arbitrator bias based on repeat business. When a financial or other institution routinely uses preprinted forms containing arbitration clauses and regularly employs arbitrators to decide disputes with consumers, an individual consumer may be disadvantaged because she or he is not repeatedly in this situation. We are concerned that the presence of

arbitrator bias in some instances may be harming consumer interests and urge judicial scrutiny of this issue.

## ARGUMENT

This Court must determine the appropriate boundaries on Petitioner Green Tree Financial Corporation's ("Green Tree") power to require pre-dispute mandatory binding arbitration in its consumer contracts. The clause in the instant case eliminated respondent's right to a trial for violations of the Truth In Lending Act ("TILA"), 15 U.S.C. §1601*et seq.*, and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f.

Consumers Union[2] files this amicus brief in support of Respondent.

### I. The Eleventh Circuit Properly Found The Arbitration Clause Unenforceable Because Of Its Silence On Costs.

The Eleventh Circuit Court of Appeals[3] properly found the mandatory arbitration[4] clause in Ms. Randolph's contract

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[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[3] *Randolph v. Green Tree Financial Corp,* 178 F.3d 1149 (11th Cir. 1999).

unenforceable. This Court has articulated a strong federal policy favoring arbitration. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements...as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration..." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 25 (1983).* "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985)).

This Court has reinforced the notion that arbitration clauses are to be enforced, but that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute. It only submits their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi,* 473 U.S. at 637.

In reversing the district court's decision in the instant case, the Eleventh Circuit noted that "[W]hile the arbitral forum usually serves just such an alternative, some barriers of access to that forum may render an arbitration clause unenforceable."[5] In reaching its decision, the Eleventh Circuit noted that three federal Courts of Appeal have concluded that substantial, undisclosed fees arising out of arbitration contracts are unconscionable. Considering the practical effects of such fees, they determined that if fees discourage or prevent a party from vindicating statutory rights, the agreement should not be enforced.

In *Cole v. Burns International Security Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997), the D.C. Circuit held that an employee could not be required to pay an arbitrator's fee–which the court estimated to range from $500 to $1000 or more, daily–to

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[4] Unless otherwise specified, the term "mandatory arbitration" in this brief means pre-dispute mandatory binding arbitration.

[5] *Id.* at 1159.

pursue his discrimination claims because the fees would discourage such an action and prevent him from vindicating his statutory rights.

The Eleventh Circuit in *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (1998), refused to enforce an arbitration clause because of a "troubling infirmity"–the arbitration clause was silent on the issue of costs. The Court found the clause unenforceable because it imposed a $2000.00 filing fee and potential responsibility for a portion of the arbitrator's fees, holding, "Because Avnet makes no promises to pay for an arbitrator, employees may be liable for at least half the hefty cost of an arbitration and must, according to the American Arbitration rules the clause explicitly cites, pay steep filing fees (in this case $2000). We consider costs of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy." *Paladino* 134 F.3d at 1059, 1062 (1998).

The 10th Circuit similarly refused to enforce an arbitration agreement in which a fee-splitting provision substantially limited an employee's use of the arbitral forum. *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3rd 1230 (10th Cir. 1999).

This Court has reaffirmed time and again the strong federal policy favoring arbitration of disputes under the Federal Arbitration Act. In cases involving arbitration of statutory rights, this Court has affirmed an equally strong policy that parties do not forego their substantive rights under the statute. The decisions in the three Courts of Appeal cases discussed above are entirely consistent with this Court's policy. All concluded that non-disclosure of a crucial term, specifically allocation of costs and fees in arbitration, rendered the arbitration clause unenforceable because excessive costs would prevent vindication of statutory rights.

Other courts have similarly found that substantial fees create a significant, if not impossible, roadblock that prevents consumers and workers from pursuing valid claims, and therefore

are unconscionable. *Pitchford v. Oakwood Mobile Homes, Inc.*, Case No. 5:99CV00053, 1999 U.S. Dist. LEXIS 20596. (Stating, "...the risk of incurring substantial expense in arbitration is a functional deterrent to any consumer like plaintiff, who has diminished financial capabilities from the outset."); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255-56 (S.D.N.Y. 1998) (stating "arbitration agreement cannot impose financial burdens on plaintiff access to the arbitral forum, 'including steep filing fees and arbitrators' fees); *Patterson v. ITT Consumer Financial Corp.*, 14 Cal. App.4th 1659, 18 Cal. Rptr. 2d 563, 566-67 (Cal. Ct. App. 1993) (refusing to compel arbitration of consumer claims where claimants were required to pay fees on grounds of unconscionability), *review denied*, 1993 Cal. LEXIS 4322 (Aug. 12, 1993), *cert. denied*, 510 U.S. 1176 (1994).

As the number of mandatory arbitration clauses increases, more consumers may face the problem of high arbitration costs. Ray Crawford, featured in a recent *Consumer Reports*[6] article, found himself victim to an arbitration clause he never knew he had signed. When the two halves of his new manufactured home didn't match up, and he was unable to resolve the problem with the manufacturer, he sought legal action. Crawford was dismayed to learn that a mandatory arbitration clause was buried in the fine print of the purchase agreement he had signed. Instead of paying a simple $65 fee to file a claim at his local courthouse, he would have to pay $2,000 to initiate an arbitration process and make a six-hour round trip to the arbitrator's office. "Before I brought this home," Crawford said, "I never heard the word 'arbitration'–didn't have a clue what it meant."[7]

The same article advises consumers that "binding arbitration is touted as a low-cost way to get justice but it can end up costlier than taking a case to court. Consumers may have to pay for the arbitrator's time, which can run $300 or more per hour–

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[6] *The Arbitration Trap*, CONSUMER REPORTS, Aug. 1999, at 64.

[7] *Id.*

effectively ruling out arbitration's usefulness in cases involving small claims. Even when the arbitrator decides in favor of the consumer, awards are often limited to simple restitution for the amount of the loss."[8]

## II. Arbitration Clauses Are Proliferating In Consumer Contracts

The very barriers to vindication of statutory rights cited in *Cole, Shankle, and Paladino* created by the costs of arbitration are the same barriers respondent in this case might have faced. Indeed, the Eleventh Circuit here based its decision on Petitioner Green Tree's fatally flawed arbitration clause that failed to mention how costs and fees would be allocated.[9] In fact, many arbitration contracts used by financial institutions are silent as to who pays which costs.[10]

As mandatory arbitration clauses proliferate,[11] the mere act of obtaining a loan, a good or service will bind consumers to

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[8] *Id.* at 64, 65.

[9] "This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration." *Randolph*, 178 F.3d at 1158.

[10] Mark Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 279-280 (1995).

[11] Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us'*, WASHINGTON POST, May 22, 1999, at A1. (First USA Bank, the largest issuer of Visa cards, with 58 million customers, added mandatory arbitration clauses in its customer contracts in 1997). *See also* Joan Lowy, *Consumers are Losing the Right to Sue Without Knowing it*, THE PLAIN DEALER, May 14, 2000, at 5L. (MBNA America, a credit card issuer with 40 million accounts, inserted a pre-dispute arbitration clause into all of its consumer agreements this year. American Express, Discover, Sears, Saks Fifth Avenue, Hooters restaurant chain, Best Buy, Gateway computers, and H&R Block have done so, as well. Mandatory arbitration clauses are turning up in residential leases, HMO contracts,

arbitrate all future disputes with the party drafting the agreement. Such a result stands on its head the notion of arbitration as a voluntary act.[12] Mandatory arbitration could soon become an involuntary and *exclusive* method of dispute resolution for potentially all consumer contract disputes.[13] With businesses that are subject to far less regulation than the banking or securities industries including mandatory arbitration clauses in their contracts, car dealers or mobile home dealers, for example, greater numbers of consumers will find themselves confronting arbitration as their only option in a dispute.[14] The widespread use of these clauses in consumer contracts represents a major change in market activity that, without adequate disclosure or an opportunity to take advantage of market alternatives, can deny consumers substantive legal rights. This shift toward arbitration should involve public debate and discussion, rather than be imposed on consumers through the unilateral actions of large and potentially monopolistic entities.

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home sales, computer warranties, and services from pest control to security brokerages).

[12] Arbitration has been defined as: "the *voluntary* submission of a dispute to an impartial person or persons for final and binding determination." American Arbitration Association, COMMERCIAL ARBITRATION RULES (1996) (emphasis added).

[13] Placing mandatory arbitration clauses in consumer contracts is a trend that is likely to continue, leaving consumers with little choice but to accept arbitration or stop doing business with financial institutions altogether. The trend is especially problematic in rural or low income areas where choices between financial institutions are often more limited. *See* Budnitz, at 267, 330.

[14] *Id.* at 320.

A. Arbitration Clauses are Often Concealed in Fine Print So That Consumers Are Not Aware They Have Waived Their Right to Go to Court.

Consumers like Ray Crawford often learn about the costs of arbitration only after discovering they have signed an arbitration clause buried in fine print in a legal document, and that in so doing, they have surrendered their right to go to court. A recent article in the *Washington Post* noted the stealth quality of pre-dispute arbitration clauses. "Last month's notice from American Express seemed routine, even innocuous–the typical fine print that's usually stuffed in the same envelope with the monthly bill and often thrown away. But card holders who read the 'F.Y.I.' update closely would have discovered that simply by using their card after June 1, they give up their right to sue the company."[15] Another newspaper reported recently, "...MBNA Corp. sent a dense notice in small type to its 40 million credit card customers informing them that they were giving up their right to go to court in favor of arbitration unless customers responded in writing within the next three weeks."[16]

These concerns are further reinforced by the reality that banks and other commercial entities resort to arbitration in order to reduce their liability exposure, as well as litigation costs.[17] A RAND study found that binding arbitration limited banks' exposure to punitive damages and unpredictable juries.[18]

> "Punitive damages and large verdicts serve both to punish . . . egregious behavior and to deter others from behaving in a similar fashion. To the degree

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[15] *See* Mayer, supra at A1 quoting Mark Budnitz.

[16] *See* Lowy, supra at 5L.

[17] Erik Moller, et.al, RAND, *Private Dispute Resolution in the Banking Industry,* 32 (1993) ("RAND study").

[18] *Id.*

> ADR eliminates these sanctions, justice and deterrence may not be well served....Courts not only resolve disputes but also establish, reinforce and *revise* standards of conduct through their written opinions.[19] No private ADR mechanism can serve this function. And if whole categories of cases are removed from public scrutiny, how appropriate changes in the common law and statutory interpretation might be accomplished becomes a serious question."[20]

As one commentator noted, "There's no question that arbitration is an excellent, wonder dispute-resolution device." But if it's so good for consumers, then why don't companies make such provisions "very clear and explain everything to consumers, and not try to hide the terms in bill stuffers or a pile of documents."[21]

B. Arbitration Clauses are Contained in Form Contracts or Contracts of Adhesion.

The problem with reconciling fundamental contract principles with the reality of standard form contracts or contracts of adhesion[22] has been well-stated by Professor David Slawson,

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[19] *See* discussion, *infra, pp. 26-27* on impact of non-public decisions in arbitration of statutory claims.

[20] *See* Moller at 32.

[21] *See* Mayer, supra at A1.

[22] Contracts of adhesion have been defined as "a standardized contract form offered to consumers of goods and services on essentially a "take it or leave it" basis without affording the consumer a realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." BLACK'S LAW DICTIONARY 318 (7th ed. 1999). See also MERRIAM-WEBSTER DICTIONARY OF LAW ("a contract that is not negotiated by the parties and that is usually embodied in a standardized form prepared by the dominant

the Torrey H. Webb Professor of Law at the University of Southern California and a long-time authority on form contracts:

> "Every prominent authority on contract law, from the treatises of Williston and Corbin to the leading cases of [California], sets forth principles from which the conclusion follows that a written instrument is a contract only if it is the parties' mutual manifestation of agreement and only if it means what the parties should reasonably have expected it to mean. The standard form in the typical consumer transaction today meets neither of these requirements. It cannot possibly be the consumer's manifestation of agreement unless the consumer is given a reasonable opportunity to read it understandingly before he chooses to buy. In fact, this opportunity is rarely given, and under the circumstances in which mass contracting occurs, it rarely could be, because normally neither the mass contractor nor the consumer is willing to spend the time."[23]

Professor Slawson criticized "[a]ll of us—judges, lawyers and professors alike" for being "mesmerized by printed forms" and treating them as the equivalent of freely-bargained for contracts, when in fact they are not.[24] Slawson has long urged that

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party.") *See also Cubic Corp. v. Marty,* 185 C.A.3d 438, 229 Cal.Rptr. 828, 833 (Cal. Ct. App. 1986); *Standard Oil Co. of Calif. v. Perkins,* 347 F.2d 379, 383 (9th Cir. 1965) (a distinctive feature of an adhesion contract is that weaker party has no realistic choice as to its terms).

[23] W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 11-12 (1974).

[24] *Id.* at 4; *See also* Arthur A. Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 142 (1970).

the writing does not control, but instead "the reasonable expectations [of the parties] *are* the contract."[25]

Classical legal theory viewed form contracts no differently than individually negotiated contracts, and enforced them according to their terms, no matter how harsh or unjust. *See, e.g., Morstad v. Atchinson Topeka and Santa Fe Ry.* (N. M. 1918) 170 P.2d 886, 889 (enforcing waiver of employer's liability signed by injured worker "in awful pain" on way to hospital while not wearing needed glasses). Under the classical theory, courts created a conclusive presumption that the signing party understood the terms.[26] This result was based on the "duty to read" doctrine, which also developed out of the paradigm of individually negotiated contracts.[27] Professor Meyerson noted, however, that the classical theory does not work when applied to standard form contracts:

> "This classical theory has no basis in either reality or justice. Courts had to create a "conclusive" presumption because such a presumption was so counterfactual. The drafters of such contracts knew the signing party had not read the terms. . . ."
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> "The other problem with the classical theory was that it permitted drafters of form contracts to abuse their power."[28]

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[25] W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms,* 46 U. PITT. L. REV. 21, 23 (1984).

[26] Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1273 (1993).

[27] *Id.* at 1267.

[28] *Id.* at 1273.

Gradually, legal scholars and courts recognized the fundamental differences between form contracts and the classical model of individually negotiated contracts. Professor Karl Llewellyn noted the importance of protecting the weaker party's reasonable expectations when interpreting form contracts:

> "[F]ree contract presupposes free bargain; and . . . free bargain presupposes free bargaining; and that where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are *those which a sane man might reasonably expect* to find on that paper."[29]

Based on these and other arguments raised by legal commentators, the Restatement (Second) of Contracts included a reasonable expectations test for analyzing the enforceability of terms in contracts of adhesion. The Restatement observed that "[a] party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even read the standard terms." RESTATEMENT (SECOND) OF CONTRACTS (1979) § 211 cmt. b. Because the drafting party has no objective expectation that there has been true assent to the terms of the contract, it cannot claim reliance upon such unread terms. Therefore, the Restatement explains the reasonable expectations test as follows: "customers are not bound to unknown terms which are beyond the range of reasonable expectation." *Id.* § 211 cmt. f.[30]

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[29] K.N. Llewellyn, *Book Review*, 52 Harv. L. Rev. 700, 704 (1939).

[30] Some may argue that strict application of the reasonable expectations rule would destroy the use of form contracts since they would become useless if consumers would not be held to their terms. Professor Slawson replies, however, that business entities have continued to use form contracts. *See* W. David Slawson, *Binding Promises: The Late 20th-Century Reformation of Contract Law*, at 68-70 (1996). He notes that the reasonable expectations test has been applied to insurance contracts for over twenty years, yet insurers continue to use form contracts. He notes that businesses will still reap substantial benefits from continued use of form contracts.

C. Consumers Do Not Read Form Contracts for Rational Reasons.

Application of the reasonable expectations test to form contracts is further supported by a significant fact: consumers do not read form contracts for sound, rational reasons. First, consumers realize they cannot negotiate to obtain better terms, leaving little point to reading the terms.[31]

Second, businesses offer form contracts for the very purpose of eliminating individual bargaining, as the Restatement recognizes: "[businesses' purposes for using standardized contracts] would not be served if a substantial number of customers retained counsel and reviewed the standard terms." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. In fact, greater economic inefficiencies from the far greater time needed for completing transactions would result if consumers were required to read and understand form contract terms prior to signing.

Third, consumers do not read form terms because they are often written in fine print, or in dense legalese. The instant case is more egregious. Ms. Randolph was actually discouraged by Green Tree's agent from reading the paperwork.

Finally, consumers do not pay attention to form terms because of the low probability of a dispute arising out of the contract.[32] Instead, consumers focus on the transaction as one for the goods or services provided, rather than viewing themselves as entering into a contractual relationship in which they have agreed to every detail in the "fine print."[33]

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[31] *See* Meyerson, *supra* at 1270-71.

[32] *See* Leff, *supra* at 148-49.

[33] *Id.* at 148-49.

The Arizona Supreme Court rejected an arbitration clause in *Broemmer v. Abortion Services of Phoenix* (Ariz. 1992) 840 P.2d 1013. Plaintiff was given forms to sign the night before her abortion procedure, one of which was labeled, "Agreement to Arbitrate." Because plaintiff could not recall signing the arbitration agreement, nor was it explained or called to her attention by the clinic, the court held that the agreement fell outside plaintiff's reasonable expectations and therefore was unenforceable. *Id.* at 1017. *Accord, Obstetrics & Gynecologists v. Pepper* (Nev. 1985) 693 P.2d 1259 (under facts similar to *Broemmer*, Nevada Supreme Court held arbitration agreement unenforceable).

Of course, arbitration may provide benefits to disputants under some circumstances—circumstances absent in this case. The premises underlying the policy favoring arbitration, a voluntary decision by both parties to accept a greater risk of an erroneous decision in return for arbitration's speed, lower costs and finality, simply do not apply to contracts of adhesion such as the one Ms. Randolph was presented with. By filing this brief, Consumers Union does not suggest that litigation is always better for consumers than arbitration. Entry into arbitration, however, should be a fully informed decision, rather than a clause buried in a contract by a party with vastly superior bargaining power, and before a dispute has even arisen.[34] Arbitration may be faster and cheaper than litigation in some cases, but it is no bargain for consumers when it forced upon them on a take-it-or-leave-it basis.

### D. Public Policy Favoring Arbitration Does Not Require the Court to Allow Green Tree to Impose Unilaterally Pre-Dispute Mandatory Binding Arbitration on All of Its Customers

Parties may always voluntarily agree to arbitration *after* a dispute arises. But it is impossible for a consumer to make a voluntary, knowing, intelligent, voluntary pre-dispute waiver. Consumers Union urges this Court to examine closely the full

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[34] *See supra* note 14.

implications of preprinted mandatory binding arbitration clauses in form contracts, an increasingly common method of imposing involuntary arbitration on unwitting consumers.

### E. This Case Raises Significant Issues Regarding The Enforceability Of Mandatory Arbitration Clauses In Contracts Of Adhesion Between Parties Of Greatly Differing Sophistication, Knowledge, And Bargaining Power

Respondent Larketta Randolph lives in rural Alabama. She arranged for a loan to buy a mobile home for $38,000, and was presented with papers by an agent who pressed her to sign quickly so he could turn in the paperwork that day to "prevent the interest rate from going up."[35] Ms. Randolph was not given an opportunity to read the document and did not know about the arbitration clause. Even if she had read it, the clause appears on the back of the document–located midway between 22 other paragraphs–and is in the proverbial fine print. In her affidavit, Ms. Randolph's says that she was not shown the reverse side of the document where the arbitration clause appeared. She said, in fact, she didn't know there was a reverse side.[36]

Green Tree Financial Corp is a multimillion-dollar corporation with abundant legal and other resources. Larketta Randolph is a consumer of modest means who signed a document on whose back side in tiny print is an arbitration clause that removes her right to go to court.[37] The imbalance of power between the parties in consumer mandatory arbitration contracts of this kind calls for judicial scrutiny.

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[35] Joint Appendix at 20-21, *Green Tree Financial Corp.-Ala. V. Randolph*, (No. 99-1235).

[36] *Id.* at 21.

[37] *See* Yvonne W. Rosmarin & Jonathan Sheldon, SALES OF GOODS AND SERVICES 569-70 (1989).

A recent district court decision demonstrated again how arbitration clauses can victimize unsophisticated, low income consumers. This case involved single mother with an 11th grade education, four young children, and an income of $1200 a month. A pre-dispute mandatory binding arbitration contract was part of the loan papers she signed for the purchase of a mobile home. She testified that when she signed the preprinted forms, there was no discussion of an arbitration clause, she had never heard the word "arbitration," and the agreement was "stuck" in front of her to sign. In striking the arbitration clause because its fee structure was "so unfair that it is rendered unconscionable," the district court also noted, "Fees and costs incident to binding arbitration in consumer transactions raise concerns for this court because these transactions most often involve parties of disparate bargaining power. This concern is enhanced in the context of a consumer transaction by the fact that the FAA expressly permits the court to assess the enforceability of arbitration agreements on the basis of fairness and conscionability." *Pitchford v. Oakwood Mobile Homes, Inc.*, Case No. 5:99CV00053, 1999 U.S. Dist. LEXIS 20596.

Law professor Mark Budnitz has described concerns about the imbalance of power in arbitration clauses in consumer contracts:

> "While laissez faire proponents deal with consumers in the aggregate as an economic unit, the consumer advocates focus on individuals who will be deprived of remedies to which they are legally entitled and the resulting hardship to these persons. They are concerned with those most likely not to realize the impact arbitration may have on them: the poor, the uneducated, and the unsophisticated. The consumer advocates feel their concerns are justified by the strategy thus far adopted by financial institutions who have made no effort to explain to customers the benefits and drawbacks of arbitration. The arbitration "agreements" seem designed to ensnare consumers

> who will not realize they are agreeing to anything at all. This is done by including the arbitration contracts as stuffers with the monthly statements rather than requiring the customer's signature on a separate document properly introduced and explained. The inclusion of dragnet clauses illustrates that the bank's strategy seems to be to win consumer acquiescence absent consumers' understanding what they are agreeing to."[38]

Mandatory arbitration clauses deprive the plaintiff of fundamental rights, including the right to trial with fact finding by a jury of one's peers, access to discovery, a resolution of the issues in dispute based on the relevant law, injunctive relief, the right to join with others in a class action, and the right of appeal except on very narrow grounds.

Virtually all transactions between consumers and commercial entities are governed by contracts of adhesion and mandatory arbitration clauses increasingly are inserted into such preprinted contracts.[39] Undoubtedly this practice will increase in the future, especially if this Court upholds the enforceability of the arbitration contract in this case.

## III. Pre-Dispute Mandatory Arbitration Clauses Threaten To Undermine Statutory Rights Created By Congress

### A. Consumer Protection Statutes Provide Specific Rights That Arbitration is Unequipped to Protect

Mandatory arbitration contracts threaten to undermine statutory rights created by Congress to enforce "society-wide norms."[40] These statutes include the two in the instant case, the

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[38] *See* Budnitz, *supra* at 321.

[39] *See* Fn. 6, *supra*.

[40] Owen Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

Truth in Lending Act (TILA),[41] the Equal Credit Opportunity Act, (ECOA),[42] as well as the Fair Credit Billing Act, [43] Electronic Funds Transfer Act, [44] state Small Loans Act,[45] and state Uniform and Deceptive Acts and Practices Acts. It is inappropriate for these claims to be resolved under the current system of arbitration.

Under ECOA, one of two statutes plaintiff claims was violated in this case, Congress provided a private right of action that consumers may pursue in state or federal court, as an individual or class action.[46] Disputes arising out of violations of consumer protection statutes tend to involve documents such as the contract, disclosure forms or a security agreement. Some or all of these documents may be in the possession of the financial institution.[47]

Mandatory arbitration, however, generally limits parties to subpoenas duces tecum, which merely requires the opposing party to bring certain documents to the arbitration. The consumer may be disadvantaged going into the arbitration because he or she lacks the ability to study and review in advance important documents. If the consumer requests additional documents, the arbitrator may be

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[41] 15 U.S.C. §§ 1601 –1665b.

[42] *Id.* §§ 1691-1691f.

[43] *Id.* §§ 1666-1666j.

[44] *Id.* §§ 1693-1693r.

[45] Kevin W. Brown & Kathleen E. Keest, USURY AND CONSUMER CREDIT REGULATION, at 30-35 (1987).

[46] 15 U.S.C. § 1691e.

[47] Richard L. Abel, *The Contradictions of Information Justice*, 1 THE POLITICS OF INFORMAL JUSTICE , 296 (Richard L. Abel ed., 1982). Abel has noted that many consumers do not maintain complete records of their official documents.

resistant to granting the request because it may require rescheduling of the hearing, in conflict with one of the goals of arbitration: limitations on discovery and delays in adjudication.

### B. Arbitrators are Not Required to Follow the Law, Yet Their Decisions are Essentially Unappealable.

This Court has held that in arbitration of statutory claims, parties are entitled to enforcement of their substantive statutory rights.[48] Requiring that arbitrators follow the law is not the norm, however,[49] and as a result, arbitrators may instead apply unconscionability or good faith concepts to disputes involving consumer protection statutes. Even if the arbitrator finds in favor of a consumer, she or he may disregard provisions allowing for treble damages or attorneys fees,[50] provisions that are critical to the efficacy of consumer protection statutes. These cases instead may allow arbitrators to follow their own notions of fairness and justice.[51] There is no way to know whether arbitrators, even if they have expertise to do so, will follow the law or reach results far astray from what Congress or state legislatures intended in enacting consumer protection statutes.

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[48] *Gilmer*, 500 U.S. at 28 (1991).

[49] Amicus Brief for the National Arbitration Forum at 6, *Green Tree Financial Corp.-Ala. V. Randolph*, (No. 99-1235). "What sets the Forum apart from many providers of arbitration services is that its arbitrators must apply the relevant substantive law." "The Forum's requirement that cases be decided under the applicable substantive law is a significant addition to the rules common to arbitration organizations."

[50] Jonathan Sheldon, *Unfair and Deceptive Practices*, at 20 (3d ed. 1991).

[51] Kirk Johnson, Public Judges as Private Contractors: A Legal Frontier, N.Y. TIMES, Dec. 10, 1993, at D20. University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1140 (Alaska 1974).

C. The Instant Case Can Be Distinguished From Supreme Court Cases Allowing Arbitration of Statutory Rights

This Court has supported arbitration of disputes involving statutory claims.[52] Two of the cases discussed below involve application of arbitration clauses where investors allege statutory violations of securities laws. Another involves a dispute between international corporations, also raising issues of statutory violations. Each of these cases, however, can be distinguished from the instant case.

While Consumers Union opposes pre-dispute mandatory binding arbitration clauses generally, which would likely include the type of clause at issue in *McMahon*, it would be wrong not to grasp the difference between the plaintiffs in *McMahon* and Ms. Randolph, plaintiff in the instant case. Unlike Ms. Randolph, an unsophisticated consumer faced with a contract of adhesion prepared for Green Tree Financial Corp by savvy legal staff, in *McMahon* the plaintiffs were trustees for pension and profit-sharing plans who were presumably well-equipped to understand the terms of the documents they signed. Indeed, this Court tempered the holding in *McMahon* by noting it would uphold such agreements "absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or *excessive economic power* that would provide grounds for revocation of any contract." *McMahon* 482 U.S. at 226 (emphasis added). This Court was further persuaded to support the arbitration process in *McMahon* because the Securities and Exchange Commission had specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers, the organizations mentioned in the arbitration agreement. *McMahon,* 482 U.S. at 235.

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[52] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), *Mitsubishi*, 473 U.S. at 625, *Rodriguez de Quijas v. Shearson/American Exp.Inc.*, 490 U.S. 477 (1989).

Again in *Mitsubishi*, this Court looked favorably upon a clause calling for arbitration of disputes covered by the Sherman Act,[53] involving the distribution and sale of automobiles. "...[w]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Mitsubishi*, 473 U.S. at 625. But Mitsubishi can once again be distinguished. The case involved an agreement between two corporations with equal bargaining power and sophisticated legal resources. Further, the parties in *Mitsubishi* were corporations residing in different countries, and this Court has given deference to arbitration agreements in international transactions that designate the forum in which a future dispute will be decided. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

In overruling *Wilko v. Swan,* 346 U.S. 427 (1958), this Court once again supported an arbitration clause in a contract with securities investors involving statutory rights. *Wilko* was "[i]ncorrectly decided and inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions," *Rodriguez de Quijas v. Shearson/American Exp.Inc.*, 490 U.S. 477 (1989).

*Rodriguez* must again be distinguished, for the plaintiffs were investors of presumably greater sophistication than the average consumer.

With businesses such as mobile home dealers and used car dealers joining the trend toward including mandatory arbitration clauses in their consumer contracts, industries that are subject to far less regulation than is even the financial industry, it is clear that greater numbers of consumers of modest means will find themselves confronting arbitration as their only option if a dispute arises.[54]

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[53] 15 U.S.C. § 1 et seq.
[54] *Id.* at 320.

D. TILA Cases Are Particularly Inappropriate for Arbitration

Because of the absence of any federal agency approving arbitration procedures under TILA, the complex regulatory scheme of the statute, and its concomitant provision of specific consumer rights, TILA is particularly inappropriate for arbitration. TILA requires specific disclosures and represents "a carefully tailored regulatory scheme which tries to balance the consumer's need for disclosure of certain information against the creditor's need for clear rules and protection from unwarranted liability."[55]

The Eleventh Circuit's decision in *Parker v. DeKalb Chrysler Plymouth,* 673 F.2d 1178 (11th Cir. 1982), reinforced this notion. The court in *Parker* held that a car dealership's payment to plaintiff in exchange for her waiver of rights under TILA was "inconsistent with the public interest in enforcing TILA requirements...Congress passed TILA in part to encourage consistent and fair treatment of borrowers." *Id.* at 1180. The court went on to note, "...the public must rely largely on the efforts of individual consumers acting as "private attorneys general" to achieve the disclosure system envisioned by the Act." *Id.* The court observed, "...[t]hey [the consumer] may be unfairly deceived if we allow such broad language to bar their claims under an Act of which they may be unaware and which was passed for the protection of all borrowers, both gullible and sophisticated." *Id.*

Once again noting TILA's unique purpose, the federal district court in Delaware declined to enforce an arbitration contract in a recent case, stating that "a ruling which compels arbitration seems contrary to the underlying purpose of TILA." *Johnson v. Tele-Cash, Inc.,* 82 F. Supp. 2d 264 (D.Del. 1999). The court determined that based on the legislative history of TILA, it seemed clear that "Congress was trying to encourage the use of

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[55] *See* Budnitz at 317 [citing JOHN SPANOGLE et al., CONSUMER LAW, CASES AND MATERIALS 106-07 (2d ed. 1991).

class actions as a means for enforcing TILA. As a result, the court believes that a strong argument can be made that TILA claims should not be arbitrated since this forum cannot provide the class-wide relief available in the courts." *Id.* at 269. The court found unpersuasive the defendant's argument that Congress had amended TILA in 1980 to curb lawsuits. "In fact, Congress observed when it amended TILA,

> The typical disclosure statement...is not an effective communication device. Most disclosure statements are lengthy, written in legalistic fine print, and have essential truth in lending disclosures scattered among various contractual terms. The result is a piece of paper which appears to be just another legal document instead of the simple, concise disclosure form Congress intended." *Id.* at 274.[56]

As *Parker* stated so emphatically, Congress enacted TILA to address the disparities in state credit disclosure laws and create uniform disclosure rules for the benefit of both creditors and consumers. *Parker*, 673 U.S. at 1180. If an arbitrator were to ignore federal policy and substitute his or her belief as to what is fair to the parties, this would undermine Congressional intent. No matter how fair an arbitrator might be, he or she should not supplant the collective wisdom of Congress or the Federal Reserve Board, each of which have years of experience determining national policy on credit disclosure.

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[56] Quoting from The Truth in Lending Simplification and Reform Act., Pub. L. No. 96-221, § 122(a), 94 Stat.168 (175)(1980)(codified as amended at 15 U.S.C. § 1631(a)(1994). *See also*, *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116 (1976), in which the District Court for Hawaii certified a class action under TILA, noting "...congressional intent to go beyond actual damages and foster the use of the class-action device as an incentive for voluntary national compliance with the Act..." at 1122, n24.

Finally, because arbitration limits discovery, has no procedure for dealing with class actions, does not require written opinions containing findings of fact and rulings of law, and contains no mechanism for transmitting data to regulatory and enforcement agencies, consumers are inevitably denied the protections enumerated above and guaranteed by Congress in these aptly-named consumer protection laws.

### E. Absence of Public Decisions in Arbitration, the Increased Use of Unilaterally Imposed Arbitration May Harm Consumer Interests in Securing Rights Provided By Statute

Most arbitrations are private. The results of arbitration are also private. Most commercial arbitrations conclude only with an award, without disclosing findings or the rationale for the result.[57] The Commercial Arbitration Rules of the American Arbitration Association require secrecy.[58] The secrecy of arbitration means that the deterrence and public education values served by open court proceedings are absent. As one commentator has noted, "arbitration makes it more difficult for a consumer to obtain information about the experiences of others. This not only increases the transaction costs for a consumer who seeks information about a financial institution, it also isolates the consumer."[59] Moreover, when disputes about a practice can be kept secret, the incentive to reevaluate them is reduced.

Commentators have made observations about other areas of law that are apt in this discussion. Our laws address both public and private disputes. In a private dispute, "only the interests and

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[57] Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992).

[58] American Arbitration Ass'n., COMMERCIAL ARBITRATION RULES 25 (1996).

[59] *See* Budnitz, *supra* at 327-28.

behavior of the immediate parties to the dispute are at issue."[60] Because of the localized nature of the dispute, the privacy of arbitration proceedings does not conflict with the interests of society in public decision making forums.[61] In contrast, a public dispute is one involving enforcement of "society-wide norms"[62] involving laws that protect the "public at large."[63] Consumer protection statutes were developed precisely out of this need to protect the public and enforce society-wide norms. Congress and state legislatures have enacted these statutes to protect a defined segment of the public from the documented abuses of a specific industry. Moreover, many of these statutes designate an agency of the government to promulgate regulations, and the agency has regulatory power over that industry. As a result, consumer protection statutes are often an integral part of a comprehensive regulatory scheme. Indeed, the regulatory agency often has the power to investigate the industry to assure compliance with the statute. Allowing an arbitrator, who is generally under no obligation to apply the law, to decide a case, the results of that decision remaining confidential, "tears at the fabric of this regulatory scheme."[64]

## IV. Consumers Union Supports Alternative Dispute Resolution That Is Mutually-Agreed On By Parties In A Dispute

In its flagship publication, *Consumer Reports*, Consumers Union has advised consumers to consider mediation and

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[60] *See* Fiss, *supra* at 30.

[61] *Id.* at 30-32.

[62] *Id.* at 31.

[63] Stewart S. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV.481 (1981).

[64] *See* Budnitz, *supra* at 323.

arbitration, describing both as "often cheaper and faster than litigation."[65] The magazine also stated that: "We think consumers should not have to sign contracts with businesses or professionals that mandate arbitration...because such contracts deprive you of access to the courts..."[66] Consumers Union's policy statement on mandatory arbitration in consumer form contracts is attached in the appendix to this brief.

The Consumers Union policy recognizes that arbitration can be a desirable way to resolve disputes arising out of consumer form contracts, but only if consumers have bona fide opportunity to make an informed choice. This may occur under two scenarios. First, if arbitration is to be binding on the parties, then consumers must be offered the choice to accept binding arbitration, or decline to enter into it, *after* a dispute arises. We believe that consumers cannot make fully informed decisions on the pros and cons of binding arbitration until after a dispute arises. This is particularly true with respect to dragnet clauses that include any and all disputes arising out of a consumer contract, including torts, the contract the consumer executed, statutory and constitutional issues. Consumers cannot possibly know what the nature of the dispute will be, and therefore they cannot know whether they will want a jury trial, will need extensive discovery, or whether they might need injunctive relief.[67]

The Consumers Union policy recommends a different approach for businesses that wish to insert a *pre-dispute* arbitration clause in their form contracts. It suggests that such pre-dispute clauses be limited to agreements for non-binding forms of

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[65] *When You Need a Lawyer*, CONSUMER REP., Feb. 1996, at 35, 38.

[66] *Id.* at 39.

[67] See also Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer*, 5 LOY. CONSUMER L. REP. 112, 119 (1993).

ADR.[68] Given the reality that the consumer will not read the form contract, this alternative preserves the consumer's reasonable expectations of having access to the courthouse.

A. Arbitration, Unlike Litigation, Presents the Danger of "Selection Bias" Against the Consumer.

Organizations that provide private arbitration services are businesses. Just like any other business, an arbitration provider needs customers in order to survive. The serious risk of unintended, and quite possibly inherent, "selection bias," is rooted in the fact that private arbitration services depend on the repeat business of commercial entities. In a published discussion on arbitration, Daniel Weinstein, then the vice chairman and senior judicial officer, Judicial Arbitration & Mediation Services Inc. (JAMS), and former superior court judge, conceded the likelihood of "unconscious as well as the conscious bias toward [the] repeat user."[69] He described the issue of selection bias as "the most profound criticism" of the "whole concept of private arbitrators providing of dispute resolution services."[70]

*Consumer Reports*, stating that "arbitration should be impartial," reported on the problem of bias when arbitration companies receive significant fees from companies seeking arbitrators. "...the National Arbitration Forum, a private, for-profit

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[68] There is precedent for non-binding ADR of consumer disputes in many states. The state of California's "lemon law" arbitration system for new motor vehicle warranty disputes, for example, provides for non-binding arbitration. *See* Civ. Code § 1793.22(c) ("if the buyer is dissatisfied with [the] third-party [dispute resolution system] decision . . . the buyer may assert the [lemon law] presumption . . . in an *action* to enforce the buyer's rights under subdivision (d) of Section 1793.2") (emphasis added).

[69] *Alternative Dispute Resolution: A Roundtable*, THE RECORDER, Spring 1993, at 11.

[70] *Id.*

corporation, provides arbitrators for and has received revenue from MBNA, H & R Block, First USA, and others. First USA has paid NAF at least $5 million in fees since 1998, according to recent court documents. Edward Anderson, the NAF's managing director, says consumers do better in arbitration than in court. But First USA disclosed in court filings that of some 19,000 disputes arbitrated and resolved over three years through NAF, cardholders prevailed just 87 times."[71]

To the extent that an organization of arbitrators demonstrates a pattern of favoritism toward industry and against consumers, this should call into question its ability to continue hearing cases. Bias in the arbitration system is of critical concern to consumers as mandatory arbitration clauses proliferate, and merits serious judicial scrutiny from this Court.

## CONCLUSION

Consumers Union is concerned about the proliferation of pre-dispute mandatory binding arbitration clauses in consumer contracts and the limitations they place on rights created at common law and by the states and Congress in consumer protection statutes. These concerns are compounded by the absence of equal bargaining power between an individual consumer and companies that draft and employ these clauses. For these reasons, we believe that consumer contracts mandatory arbitration clauses merit close scrutiny. We urge the Court to affirm the decision below.

Respectfully submitted,

Sally J. Greenberg*
Consumers Union of U.S.
1666 Connecticut Avenue
Suite 310
Washington, DC 20009
(202) 462-6262
*Counsel of Record*

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[71] *Give up Your Right to Sue?*, CONSUMER REPORTS, May 2000 at 8.

# APPENDIX

## APPENDIX 1A

### Consumers Union Policy on Arbitration and Other ADR Clauses in Standard Form Consumer Contracts

**Standard form contracts offered to consumers by commercial parties are increasingly likely to contain clauses requiring the consumer to participate in arbitration or another form of alternative dispute resolution (ADR). These clauses have the potential to prevent consumers from having their claims heard in court. Consumers Union's policy on mandatory arbitration and ADR clauses is designed to promote standards for when these clauses should be permitted to be placed in consumer form contracts, or enforced if found in such contracts, and to promote fair procedures in the implementation of ADR clauses.**

A. ADR, including arbitration, should not be required in consumer form contracts unless the consumer has the option either to decline to engage in the ADR process after the dispute arises or to reject the results of the ADR process. In other words, ADR clauses should be permitted and enforceable in consumer contracts only if the ADR process is: 1) contractually mandated with non-binding results, 2) optional with binding results, or 3) optional with non-binding results.

B. The ADR process must be fair. The overall fairness of a contractually imposed ADR process should be judged by compliance with the following criteria.

   A. ADR clauses imposed in a consumer form contract must not select an ADR provider if the location of that provider would impose unreasonable travel costs upon the consumer in order to fully participate in the hearing of the claim.

B. Any consumer contract requiring the consumer to submit to ADR should contain a clear, conspicuous, and understandable disclosure describing the degree to which the consumer gives up any rights he or she otherwise possesses to go to court. Whenever the parties or their agents engage in face-to-face discussions leading to formation of the contract, there should also be a clear oral disclosure.

C. ADR clauses should not apply to cases where a consumer is seeking injunctive relief, unless, after the dispute arises, the consumer agrees to the ADR process and the ADR decision maker has the power to order injunctive relief.

D. In order for any ADR provider to be preselected in a consumer form contract, that provider must maintain an index of actions which is open to the public. The index must identify the parties to the disputes it has pending and has resolved in the past five years. The results of its ADR procedures involving individual consumers should also be available, unless the ADR decision maker has found that there is a special need to seal the results of the ADR proceeding.

E. Whenever the result of ADR will be binding or subject only to limited review, all parties should have access to civil discovery to the degree necessary to the claims and defenses presented. In particular, consumers should always have access to the complete file, if any exists, about their claim or dispute, and to evidence indicating that any problem they allege is part of a larger pattern or practice of the business.

F. Standard form consumer contract ADR clauses should be invalid if the preselected ADR provider does

not require that the officer who presides at the ADR proceeding must swear all the witnesses to tell the truth.

G. Standard form contract ADR clauses in consumer contracts should be disallowed unless they provide that the consumer may appeal for review of alleged errors.

H. ADR providers selected in consumer form contracts must provide for waiver of fees and costs for indigent individuals.

I. ADR clauses in consumer form contracts should be invalid if they select an ADR provider which does not have an effective method of internal review to reduce the risk of selection bias. This is of critical importance. State licensing of ADR providers may also be necessary.

J. ADR providers selected in consumer form contracts must provide a written statement of the basis for any decision which is binding when issued.

K. Conflict of interest disclosures should be made by all proposed single ADR decision makers and all who are proposed to serve as a so-called "neutral third." At least the following should be disclosed:

- Names of prior or pending cases involving any party to the ADR agreement or any attorney for any of the parties in which that person is serving or has served as an arbitrator, party or attorney.

- The results of each concluded case involving any of the parties or attorneys for the current case, including the identity of the prevailing party and the date and amount of any award.

After disclosure, the consumer should have the right to reject the proposed decision maker.

L. ADR should never be used to eliminate or delay a consumer's access to a small claims court action, licensing or other administrative proceeding, or a consumer class action.

MOTION FILED

JUL 21 2000

No. 99-1235

In the

# Supreme Court of the United States

**GREEN TREE FINANCIAL CORP. – ALABAMA, and GREEN TREE FINANCIAL CORPORATION,**

*Petitioners,*

v.

**LARKETTA RANDOLPH,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF TERRY JOHNSON AND THE ILLINOIS CONSUMER JUSTICE COUNCIL, INC. IN SUPPORT OF RESPONDENT

DANIEL A. EDELMAN
*Counsel of Record*
CATHLEEN M. COMBS
JAMES O. LATTURNER
JOHN M. BRODERICK
EDELMAN, COMBS & LATTURNER
120 South LaSalle Street
18th Floor
Chicago, Illinois 60603
(312) 739-4200

*Attorneys for Amicus Curiae Terry Johnson and the Illinois Consumer Justice Council, Inc.*

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

BEST AVAILABLE COPY

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Terry Johnson and the Illinois Consumer Justice Council, Inc., pursuant to U.S. Supreme Court Rule 37, bring this motion for leave to file an amicus curiae brief in support of Respondent Larketta Randolph, in *Green Tree Financial v. Randolph*, 99-1235 (USCA11). In support of this motion, Johnson states as follows:

1. Terry Johnson is the plaintiff in *Johnson v. Tele-Cash, Inc.*, 99-104-GMS, which was filed in the District Court of the District of Delaware and is currently pending in the Third Circuit Court of Appeals. Like the plaintiff in *Green Tree Financial Corp v. Randolph*, Johnson filed a class action complaint pursuant to the Truth In Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"). The claim is based on a short-term, high-interest (917% APR) loan obtained from the defendant creditors.

2. The defendants' standard form loan agreements contain an arbitration clause. The defendants moved to compel arbitration and the District Court denied the motion. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 3d 264 (D. Del. 1999).

3. Although the outcome is the same as here (arbitration of a TILA claim was not compelled), the District Court based its decision on entirely different grounds than the Eleventh Circuit did in *Randolph v. Green Tree Financial Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999). The District Court held that there was an "inherent conflict" between TILA's provision for class actions and arbitration.

4. This Court's ruling in *Green Tree Financial Corp. v. Randolph* will have a substantial impact on Johnson's case, in which an appeal is pending in the Third Circuit.

5. The Illinois Consumer Justice Council, Inc. ("ICJC") is interested in maintaining the continued effectiveness of federal, state and local consumer protection laws, including the Truth in Lending Act ("TILA"). To this end, it has engaged in advocacy efforts on behalf of consumers before federal and state legislatures and courts and administrative agencies. While respondent will argue in favor of that ruling, and ICJC supports respondent's position, ICJC's position is different. ICJC wishes to point out that Congress created a scheme of enforcing consumer credit statutes through statutory civil fines imposed in "private attorney general" class actions.

6. This will be the first Supreme Court ruling on arbitration clauses in the context of the Truth in Lending Act, indeed in the context of any consumer protection statute.

7. The parties have withheld consent to the filing of this brief.

WHEREFORE, Terry Johnson and the Illinois Consumer Justice Council, Inc. respectfully request that this Court grant them leave to submit their brief amicus curiae.

Respectfully submitted,

DANIEL A. EDELMAN
*Counsel of Record*
CATHLEEN M. COMBS
JAMES O. LATTURNER
JOHN M. BRODERICK
EDELMAN, COMBS & LATTURNER
120 South LaSalle Street
18th Floor
Chicago, Illinois 60603
(312) 739-4200

*Attorneys for Amicus Curiae*
*Terry Johnson and the Illinois*
*Consumer Justice Council, Inc.*

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## INTEREST OF THE AMICUS CURIAE

### A. Terry Johnson

Terry Johnson is the plaintiff in *Johnson v. Tele-Cash, Inc.*, 99-104-GMS, which is pending in the District Court of the District of Delaware.[1] Like the plaintiff in *Green Tree Financial Corp. v. Randolph*, Johnson filed a class action complaint pursuant to the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"). Johnson's claims are based on a short-term, high-interest loan obtained from the defendant creditors.

The defendants' standard form loan agreements contained an arbitration clause. The defendants moved to compel arbitration and the District Court denied the motion. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999). The District Court denied the motion on different grounds than those found in the Eleventh Circuit opinion that is being reviewed in this case. The defendants in *Johnson v. Tele-Cash, Inc.* have appealed the District Court ruling and that appeal is currently pending in the Third Circuit.

This Court's ruling on the matter could have a substantial impact on Johnson's case in that this will be the first Supreme Court ruling on arbitration clauses in the context of the Truth in Lending Act, indeed in the context of any consumer protection statute. Therefore, Terry

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[1] This brief was authored by counsel for Terry Johnson and the Illinois Consumer Justice Council, Inc. ("ICJC"). No one other than the ICJC or council for Johnson and ICJC made a monetary contribution to the preparation or submission of this brief.

Johnson respectfully requests this Court grant his motion to file this *amicus curiae* brief.

**B. Illinois Consumer Justice Council, Inc.**

The Illinois Consumer Justice Council, Inc. ("ICJC") is interested in maintaining the continued effectiveness of federal, state and local consumer protection laws, including the Truth in Lending Act ("TILA"). To this end, it has engaged in advocacy efforts on behalf of consumers before federal and state legislatures and courts and administrative agencies.

This appeal involves the issue of whether arbitration clause should insulate an entire industry from class action penalties prescribed by the TILA. The Eleventh Circuit has held that TILA claims cannot be arbitrated unless it is clear that the fee shifting provisions are of the statute are expressly left intact. While respondent will argue in favor of that ruling, and ICJC supports respondent's position, ICJC's position is different. ICJC wishes to point out that Congress created a scheme of enforcing consumer credit statutes through statutory civil fines imposed in "private attorney general" class actions. ICJC therefore asks this Court to hold that TILA claims are not arbitrable because of the inability to obtain the penalty through arbitration. The arbitration clause would effectively waive a penalty to which Congress intended to subject defendants in the public interest.

## SUMMARY OF ARGUMENT

The Eleventh Circuit in *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999) held that an arbitration clause in a credit transaction was unenforceable because the arbitration clause was silent as to whether a consumer bringing a suit pursuant to the Truth In Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA") would be awarded fees and costs if she prevailed (because TILA is a fee shifting statute). Since arbitration in this case could not guarantee "that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order" it could not be said the consumer's ability to "vindicate her statutory rights will not be undone. . ." *Id.*

The plaintiff in *Johnson v. Tele-Cash, Inc.* also brought a cause of action pursuant to the TILA. Johnson brought his suit as a class action, as did the plaintiff in *Green Tree Financial.* The Eleventh Circuit did not consider whether the fact that the plaintiff had brought a class action suit pursuant to TILA, which specifically encourages and provides for class actions, also was a basis for not enforcing the arbitration clause because plaintiffs cannot bring class actions in arbitration.

The District Court in *Johnson v. Tele-Cash, Inc.* held that because Congress clearly intended that TILA be enforced through the use of a civil fine imposed in a "private attorney general" class action, the arbitration clause at issue was not enforceable. The District Court in *Johnson* followed Supreme Court precedent and determined that there was an "inherent conflict" between arbitration and the purpose of the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA") and the Electronic Funds

Transfer Act, 15 U.S.C. §1693 *et seq.* ("EFTA"). *See Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987). The District Court analyzed the text of the statutes and legislative history and rightfully concluded that *Congress* was of the view that class actions were necessary to promote nationwide, uniform conformity with the TILA and to provide a meaningful enforcement provision for both statues. Enforcing arbitration would defeat Congress' express purpose of "encouraging" class actions. "[T]here would be no way to 'provide creditors with a meaningful incentive to comply with the law' since they would not longer be facing the 'meaningful penalty provisions [which were] needed to [e]nsure compliance.'" *See Johnson*, 82 F. Supp. at 269-70 (quoting S. Rep. 93-278, at 14-15). Thus, this provides an alternative basis for affirming the Eleventh Circuit decision in *Randolph v. Green Tree Financial Corp.*

## ARGUMENT

### I. INTRODUCTION

On July 10, 1998, Johnson applied for and received a short-term loan in the amount of $ 250 from the County Bank of Rehoboth Beach. The one-page loan agreement set forth an annual percentage rate of 917 percent and a finance charge of $88.[2] As a result, Johnson was required

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[2] The plaintiff in Johnson alleges that (1) the loan violated EFTA by imposing an irrevocable authorization for electronic payment; (2) the annual percentage rate and finance charge were not more conspicuous than any other terms in violation of

(continued...)

to repay his $250 loan by making one payment of $338 on July 24, 1998—two weeks after he submitted his loan application and received the $ 250.

The loan agreement provided the following "boiler plate" arbitration clause which, in relevant part, reads:

> **ARBITRATION**: You and we agree that *any* claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . ., *including* the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation *shall* be resolved by binding arbitration . . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.
>
> (emphasis added).

Below this paragraph, the loan agreement provides two others which state: "Notice: You and we would have had a right or opportunity to litigate disputes through a court but have agreed instead to resolve disputes through binding arbitration." The document further provided, "By signing and sealing below, you agree to all of the terms of this Note including the agreement to arbitrate disputes."

Examples of arbitration clauses in other short-term, high-interest loans (oftentimes known as "payday" loans) are as follows:

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[2] (...continued)
TILA; (3) the loan was unconscionable, and (4) the arbitration clause should be declared void.

**Check into Cash of Indiana, LLC, dba Check into Cash, 10075 E. Washington St., Indianapolis, IN 46229, (547.50% APR)**

"ARBITRATION. Any controversy, claim or dispute arising out of or relating to this Agreement, or the breach thereof, whether sounding in tort, contract or otherwise shall be settled pursuant to the Indiana Arbitration Act, I.C. § 34-4-1-1, *et seq.*, upon the complaining party submitting tot he other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claimant may pursue this claim through arbitration, court action or other means otherwise available. The arbitration shall be conducted by a single arbitrator selected by agreement between the parties hereto, or by petitioning the Indiana superior or circuit court to select the arbitrator if no agreement on the selection of an arbitrator can be reached by mutual agreement of the parties. Each party shall bear the costs of their own respective attorneys' fees in connection with any arbitration hereunder, and all costs and expenses other than attorneys' fees will be paid in accordance with the award issued by the arbitrator. Any and all damages awarded by the arbitrator shall be subject to confirmation by any court of the State of Indiana or any federal court located therein having proper jurisdiction."

**Check 'n Go of Illinois, Inc., 2317 S. Cicero Ave., Chicago, IL 60804 (521.43% APR)**

"*Arbitration Provision*. . . . There shall be no authority for any claims to be arbitrated on a class action basis. . ." *[Note: This is found in the middle of a two-paragraph, twenty-seven line arbitration clause.]*

**National Money Service, Inc. 1156 W. 103d St., Ste 201, Kansas City, MO 64114 (APR allegedly not disclosed but estimated to be 780%)**

"*Arbitration* You and we agree that any claim, dispute or controversy between us any claim either of us against the other (or the agents, servicers or assigns of the other including the company) and any claim arising from or relating to the agreement no matter by whom or against whom made including the validity of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration by and under the code of procedure of the National Arbitration Forum. . . ."

**Hoosier Check Cashing of Ohio, Ltd., 2839 E. State Blvd., Ft. Wayne, IN 46805 (260.71% APR)**

"ARBITRATION. To pursue any claim, demand dispute or cause of action ("claim") arising under this Agreement or any breach or default thereof, the claimant must submit to the other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claimant may pursue the claim though (sic) arbitration, court action or any other means otherwise available. If the other party responds to the submittal in writing within ten (10) days of its receipt, the claim must be submitted to binding arbitration in accordance with the rules of the Uniform Arbitration Act approved by the National Conference of Commissioners on Uniform State Laws of the American Bar Association, as amended. The arbitration shall be conducted by a single independent arbitrator selected by Check$mart and conducted in the county where this Agreement was signed. The expenses of the arbitration, including attorney's fees, will be paid in accordance with the award issued by the arbitrator."

## II. IF COMPELLING ARBITRATION DISRUPTS THE STATUTORY SCHEME, THE STATUTORY CLAIM SHOULD NOT BE ARBITRATED

The District Court in *Johnson* was correct in following *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987). When dealing with statutes that evince a contrary congressional mandate, "*deducible* from text or legislative history," arbitration is precluded on those claims. *Mitsubishi*, 473 U.S. at 628 (emphasis added). This intent is "deducible from . . . an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227.[3]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in an arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (quotations omitted).

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[3] This is consistent with the long-standing principle of statutory construction that the implications of one statute may be altered by the implications of a later statute. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 2000 U.S. LEXIS 2195, No. 98-1152, 2000 WL 289576, at *13 (Mar. 21, 2000); *Healthcare v. Watson Pharmaceuticals, Inc.*, 2000 U.S. App. LEXIS 6200, *20 n.3 (2d Cir. April 4, 2000); *Sunshine Health Systems v. Bowen*, 842 F.2d 1097, 1101 (9th Cir. 1988); *In re Johnson*, 787 F.2d 1179, 1182 (7th Cir. 1986). Of course, this is not the same as arguing that a prior statute was repealed by implication by a later statute.

Where the arbitration clause would be a barrier to a litigant's exercise of his or her statutory rights, the arbitration clause is unenforceable. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1157 (11th Cir. 1999) *cert. granted, Green Tree Financial Corp. v. Randolph*, ___ U.S. ___, 120 S. Ct. 1552 (2000); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) ("When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable").

"[A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[ ] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum." *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999).

Congress specifically provided for class action relief when enacting TILA, 15 U.S.C. §1640, and EFTA, 15 U.S.C. §1693m. Such relief is beyond the power of an arbitrator. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). If an arbitrator cannot grant the relief specified in TILA, the TILA claim cannot be subject to arbitration. *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Central Ltd.*, 154 F.3d 404 (7th Cir. 1998). Even where the claim is of a type which can normally be

arbitrated, if the arbitrators are deprived of the ability to afford complete relief, the particular arbitration clause cannot be enforced. *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998). An arbitration clause is unreasonable when it requires a consumer to give up access to the courts, forsake his rights and constitutional protections. *See In re Knepp*, 229 B.R. 821, 838 (Bankr. N.D.Ala. 1999).

In *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1481-82 (D.C. Cir. 1997), the court emphasized that an arbitration clause cannot be used to deprive persons protected by the law of their substantive rights:

> **The starting point of our analysis is the Supreme Court's decision in *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991). In that case, the Court held that an employee's agreement to arbitrate employment-related disputes may require him to arbitrate statutory claims under the ADEA because "by agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (first alteration in original). As noted above, the Court emphasized that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (alteration in original). . . .**
>
> **Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it**

**imposes. See Gorman, 1995 U. ILL. L. REV. at 644 ("The Supreme Court in the Gilmer case did not hold that any sort of arbitration procedure before any manner of arbitrator would be satisfactory in the adjudication of public rights."). Such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like the ADEA and Title VII. The beneficiaries of public statutes are entitled to the rights and protections provided by the law. Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination. [citation] Any such condition of employment would violate Title VII, regardless of whether or not the agreement was viewed as a contract of adhesion. Thus, in a subsequent suit by the employee raising a viable claim of racial discrimination or sexual harassment, it would be no defense that the employee had signed a contract giving up her right to be free from discrimination.**

**Similarly, an employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard. . . . At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections. See *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246-48 (9th Cir. 1994) (arbitration clause that purported to waive remedies provided by federal statute and to shorten statute of limitations for filing such claims violated statute and was unenforceable); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 144-45 (1983) (preservation of "individual rights requires an accessible legal system for their protection" and enforcement)....**

*Cole* further held that "[t]he premise of the [Supreme] Court's rulings . . . is that arbitration entails only a waiver of a procedural right to a judicial forum rather than a waiver of any substantive right accorded by the statute. *Id.*, at 1483, quoting S. Estreicher, Arbitration of Employment Disputes Without Unions, 66 CHI.-KENT L. REV. 753, 791 (1990).

The inconsistency between the substantive statute and arbitration need not be express. As the Seventh Circuit held in *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Central Ltd.*, *supra*, 154 F.3d at 410-11, "No provision of the Interstate Commerce Act expressly forbids the arbitration of claims under the Act. But the cases we have cited hold that the statutory prohibition need not be express to be effective; as in other cases of preemption, it is enough if allowing arbitration would disrupt the statutory scheme." *See also McMahon*, 482 U.S. at 227 (whether there is an "inherent conflict" is "deducible" between arbitration and the statute's underlying purposes).

Notwithstanding, creditors seek to insulate themselves from TILA's class action penalties and thereby thwart Congressional goals of promoting nationwide uniform compliance.

## III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE WAS AN "INHERENT CONFLICT" BETWEEN COMPELLING ARBITRATION AND THE UNDERLYING PURPOSES OF TILA AND EFTA

"[W]ithout the possibility of class action liability looming on a creditor's horizon, there is a very real possibility

that these entities will not voluntarily comply with the Truth-in-Lending regulations." *See Johnson*, 82 F. Supp. 2d at 271. The District Court correctly recognized Congress' concerns about lack of nationwide compliance and that the purpose of the class action remedy was to ensure such compliance. *See* S.Rep. 93-278 at 14-15 ("The Committee believes a maximum class action liability of $100,000[4] is sufficient to deter potential violations and achieve widespread compliance."). Without this remedy, the Court held the penalty of class relief imposed by Congress would be evaded and the consumer protection statutes would lose their sting.

### A. The Purpose of TILA.

It is evident that Congress, in enacting the 1974 amendments to TILA, intended to create a private attorney general class action right for the express purpose of "insur[ing] nationwide adherence to uniform disclosures" and providing a vehicle by which courts can "assess a meaningful penalty upon a creditor to induce compliance with" TILA's requirements. S.Rep. 93-278, 14-15. The District Court correctly rejected the holdings of *Lopez v. Plaza Fin. Co.*, No. 95-C-7567, 1996 WL 210073 (N.D. Ill. Apr. 26, 1996) and *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999). These courts failed to appreciate the intent of Congress. Their approach is inconsistent with the Supreme Court opinions that require this analysis. *See Lozada v. Dale Baker Oldsmobile, Inc.*, No. 99 CV 620, 2000 U.S. Dist. LEXIS 4122 (W.D. Mi. Mar.

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[4] Later this section was amended upward to $500,000.

27, 2000) (rejecting *Lopez* because decision in *Johnson* is a more "thorough discussion" of how remedial purposes of TILA are defeated by arbitration clauses).

The District Court reviewed the substantial amount of legislative history available that demonstrates Congress thoroughly evaluated its options for enforcement and purposefully incorporated class actions into its scheme for enforcement by "private attorney generals." In 1974, Congress amended §1640 to provide a cap on liability for class actions brought under TILA. *Watkins v. Simmons & Clark*, 618 F.2d 398, 400 (6th Cir. 1980); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1119-20 & n.10 (D.Haw. 1976). This amendment was in direct response to courts' reluctance to certify classes under TILA. Prior to the amendment, a plaintiff was entitled to a minimum award of $100 under the statute. *See* 15 U.S.C. §1640 (1970). Without the cap, if a class action lawsuit involved millions of consumers, a defendant creditor would be liable for "an astronomical damage figure." For this reason, numerous courts found class actions *not* to be a superior method of adjudication because of the extreme penalty. The courts found this to be "inconsistent" with the "remedy Congress prescribed as the means of private enforcement." *See Ratner v. Chemical Bank of New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

As stated by the District Court, "In response to these decisions, Congress amended the statute to provide a limit on the maximum recovery available under the TILA. This amendment was intended to encourage the federal courts to begin certifying class actions in Truth in Lending lawsuits." *See Johnson*, 82 F. Supp. 2d at 269; S.

Rep. 93-278, at 14-15 (1973); *Watkins*, 618 F.2d at 400 n.6; *Bantolina*, 419 F. Supp. 1116, 1119-20 & n. 11.

It was Congress's express intent to encourage the use of class actions as an enforcement mechanism. *See Watkins*, 618 F.2d at 401 & n.7 (citing S. Rep. 94-590, *reprinted in* 1976 U.S. Code Cong. & Admin. News, at 431, 438). While the amendment limited the exposure of creditors to the lessor of $500,000 or 1 per centum of their net worth, the amendment provided "a workable structure for private enforcement." *Id.* Congress concluded the cap to be a sufficient deterrent against a creditor of any size.

Congress decided that the statute would be enforced privately, and with class actions, *not* by a federal agency, such as the FTC. "The purpose of the civil penalties under [the] Truth in Lending [Act] was to provide creditors with a meaningful incentive to comply with the law without relying on an extensive new bureaucracy." S. Rep. 93-278, at 14.

The defendants in *Johnson v. Tele-Cash, Inc.* argue that *Gilmer* means that the inability to bring a class action does not make an arbitration clause unenforceable. But that argument takes *Gilmer* out of context. The court recognized that the EEOC, the administrative agency charged with enforcing the ADEA (the statute at issue in *Gilmer*), was still able to bring class actions. *Gilmer*, 500 U.S. at 32. Thus, the court relied in part on the fact that a federal agency had the power to enforce a statute with class actions; but, in this case, an agency is not effectively structured to do so, which Congress recognized and instead opted to encourage individuals to bring class actions. *See Watkins v. Simmons & Clark,*

*Inc.*, 618 F.3d 398, 400 (6th Cir. 1980) (holding that the intended purpose of the TILA was to encourage class actions in the truth-in-lending context because of the apparent inadequacy of the Federal Trade Commission's enforcement resources) (citing S. Rep. 93-278, at 14-15).

It is important to note that Congress intended TILA remedies to be punitive in nature, rather than compensatory. Class actions under a statute such as the ADEA as discussed in *Gilmer* are really accumulating individual claims, whereas TILA class actions seek to impose statutory damages determined in the same manner as a criminal fine. Congress characterized the statutory damages provision as "the civil penalties section." S. Rep. 93-278, at 14.

Section 1640 provides that "In determining the amount of award [of statutory damages] in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." The damages are thus assessed in the same manner as a *fine or punitive damages*, and the classwide statutory damages are not merely a convenient means of enforcing the individual rights of numerous class members. Because this penalty is similar to a fine, creditors should not be allowed to escape its effects by contract.

The purpose of the cap was to provide a meaningful incentive to effectuate compliance with the law and yet make the penalty reasonable. S. Rep. 93-278 at 14. Congress, concurring with the Federal Reserve Board, found

that "potential class action liability [wa]s an important encouragement to the voluntary compliance which [wa]s so necessary to ensure nation-wide adherence to uniform disclosure" since "[m]ost Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to [e]nsure compliance." *See Johnson*, 82 F. Supp. 2d at 270 (quoting S. Rep. 93-278, at 15). This is why it has been held that class-action exposure is "essential to the prophylactic intent" of TILA. *Bantolina*, 419 F. Supp. at 1120. This is what gives the statute its "sting." *Id.*

Thus there was ample evidence of Congressional intent for the District Court to conclude that "Congress did intend . . . to encourage class actions and to use the threat of class action recoveries to force compliance with the Act." *See Johnson*, 82 F. Supp. 2d at 270 (quoting *Watkins*, 618 F.2d at 402). The legislative history for TILA relied on by the District Court is more developed and expansive than a "general statement of legislative purpose." *See Pritzker v. Merril Lynch*, 7 F.3d 1110, 1119 (3d Cir. 1993). In *Pritzker*, the Court held that ERISA claims were arbitrable; it rejected statements that Congress intended the courts to provide a consistent source of law to help plan "administrators, fiduciaries and participants to predict the legality of proposed actions," because "general statements of legislative purpose" would not be sufficient to prohibit enforcement of arbitration agreements. *Id.* Nor would the Court draw an inference from a statute's jurisdictional provisions to mean that arbitration was precluded.

Here, Johnson is not relying on TILA's jurisdictional provisions. The legislative history here is far more

specific than what *Pritzker* rejected. The District Court did not rely merely on general statements of legislative purpose but Congress' recurrent modification of the statute for the express purpose of "encouraging class actions." The Senate Report reveals that Congress engaged in a thorough investigation and analysis in order to counter judicial hostility to TILA class actions and yet to still effectuate the goal of national uniform compliance. This is the same sort of legislative history that this Court relied on in *Sues v. John Nuveen & Co., Inc.*, where the Court held that Congress had expressed its intent to "encourage" arbitration in the context of the Civil Rights Act of 1991. *Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 n.1 (3d Cir. 1998). Therefore, any argument that the legislative history is insubstantial must be rejected.

The District Court correctly concluded that by compelling arbitration, Johnson would be precluded from seeking class relief. This would strip the federal statute of its "sting" and reduce it to nothing more than its mere "nuisance" value. Consequently, creditors were not provided with a "meaningful incentive for compliance" since they would not be facing a "meaningful penalty provision." S. Rep. 93-278 at 14, 15. Congress determined this to be an effective and desirable means of vindicating the statute's cause of action and that class actions served a meaningful remedial and deterrent function. In light of this and the Supreme Court opinion in *Mitsubishi*, the District Court found an "inherent conflict" between compelling arbitration and the underlying purposes of TILA. *See Johnson*, 82 F. Supp. 2d at 271.

While the statute does not provide an *automatic* right to $500,000 worth of class relief (for obvious due process

concerns), it cannot be ignored that Congress intended for class relief to be part of its statutory scheme, and for this reason the District Court disagreed with *Lopez*. The District Court found that "by enforcing the boiler plate arbitration clause which is contained in this (an every other) one-page loan agreement unilaterally drafted by the defendants, the court would be allowing them to effectively insulate themselves against the very statutory penalties which Congress deemed necessary to 'provide creditors with a meaningful incentive to comply with the law.'" *See Johnson*, 82 F. Supp. 2d at 269 (quoting S. Rep. 93-278, at 14); *see also Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. App. Ct. 1999) ("The arbitration clause also effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers. . . Class litigation provides the most economically feasible remedy for the kind of claim asserted here. The potential claims are too small to litigate individually. . . The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here. . .").

For example, Johnson could only recover a maximum of $1,000 statutory damages, *see* 15 U.S.C. §§ 1640(a)(1)(2)(A), whereas, as a representative of a class, he could obtain 500 times that amount. Enforcing the arbitration clause raises doubts as to whether TILA could serve both its "remedial and deterrent functions." *See Johnson*, 82 F. Supp. 2d at 270 (quoting S. Rep. 93-278, at 14).

Congress need not expressly discuss alternative dispute resolution options for a statute to preclude arbitration. But Congress need not discuss and reject all other options of enforcement. "[T]he cases we have cited hold that

the statutory prohibition need not be express to be effective; as in other cases of preemption, *it is enough if allowing arbitration would disrupt the statutory scheme.*" *Baltimore & Ohio Chicago Terminal*, 154 F.3d 404, 410 (7th Cir. 1998). TILA provides for class actions and judicial enforcement for exactly the same reasons that the Interstate Commerce Act at issue in *Baltimore & Ohio* confided certain tariff issues to the Surface Transportation Board—nationwide compliance and uniformity are essential. The statutory scheme here is to allow suit by "private attorney generals" and create liability of up to $500,000 or 1% of net worth for noncompliance.

In fact, because Congress has expressly "encouraged" arbitration of other statutory causes of action, principles of statutory interpretation would suggest that if Congress intended to encourage arbitration of statutory rights it could do so. *See Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) (discussing Section 118 of the Civil Rights Act of 1991). Section 118 provides: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]." In relying on the same source of legislative history that the District Court did in this case, this Court found Congress sufficiently expressed its intent that claims under the ADEA may be arbitrated. This Court held:

> "Not surprisingly there is ample legislative history to support a straightforward reading of the text of §§ 118. The Report of the House Committee on the Judiciary, for example, explains §§ 118 as follows:
>
> 'This section "encourages" the voluntary use of conciliation, mediation, arbitration, and other methods

> of resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims. . .
>
> We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.
>
> H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 764.'" *Sues*, 146 F.3d at 182 n.1.

To conclude that arbitration precludes Johnson's pursuit of his class action claim is to say he waived this remedy under TILA. This is precisely what Congress intended to prevent by providing that it is unlawful to discriminate against the exercise of any right under the Consumer Credit Protection Act. 15 U.S.C. §1691(a)(3).

In *Parker v. DeKalb Chrysler Plymouth*, *supra*, 673 F.2d 1178, 1182 (11th Cir. 1982), the court held that a general release did not apply to TILA claims. In so holding, it stressed that TILA is imbued with a public purpose with individuals and their attorneys serving as private attorneys-general. The specific grant of the right to bring class action litigation is part of enforcing that public purpose. If creditors were allowed to bypass the class action device through the use of arbitration clauses, congressional attempt would be stymied.

"Before *Gilmer*, courts had unanimously found that any waiver, including a knowing waiver, of statutory rights was precluded. In *Gilmer*, the Court established the baseline test that 'so long as the prospective litigant effec-

tively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions.'" *Hooters of America*, 39 F.Supp. 2d 582, 616 (D.S.C. 1998), quoting *Gilmer*, 500 U.S. at 28. Recognizing this concept, the Court of Appeals in *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), held that statutory rights under the Fair Labor Standards Act could not be made the subject of binding arbitration. This decision affirms the validity of *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), which the court relied upon in *Parker v. DeKalb Chrysler-Plymouth*, 673 F.2d 1178 (11th Cir. 1982), to hold that TILA rights were not the subject of a general release. Further, even the individual suit under Truth-in-Lending has public dimensions. *See Buford v. American Finance Co.*, 333 F. Supp. 1243, 1248 (N.D.Ga. 1971). Additional public-related benefits are provided by the stare decisis effect successful litigation may have entitling others to statutorily provided relief. . . " *Id.*; *Accord*, *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994) ("Congress intended the statute to create a system of private attorneys general to aid its enforcement; thus, to further its remedial purpose"). Reported decisions are important to the stated purpose of having standardized disclosures on a nationwide basis. No matter where you are in the country, you should get the same form disclosures. This requires reported decisions with reasons spelled out and subject to appellate review. The Court found reported decisions expendable under ERISA, *see Pritzker*, 7 F.3d at 1119, but under ERISA every plan can be different. The purpose of TILA requires uniform disclosures which necessitates reported law.

In *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 988 P.2d 67 (Cal. 1999), the court would not enforce an arbitration clause because it impeded the ability of plaintiff to "[play] in the role of a bona fide private attorney general" as intended by the California legislature in the California Legal Remedies Act (CRLA). *Broughton*, 988 P.2d at 76-77. Similarly, here, arbitration would impede the public benefit Congress intended by encouraging plaintiffs to bring class action suits as private attorney generals to enforce uniform compliance with TILA. The court in *Broughton* distinguished its holding from the outcome in *Mitsubishi Motors*, which held that the Sherman Act's treble damages provision only had an "incidental" public benefit. In *Broughton*, the intent to create "private attorney generals" and ability to obtain injunctive relief had a more tangible public benefit and was clear expression of legislative intent that suits brought under the CRLA were to have a public benefit rather than only compensate the plaintiff individually.

Similarly here, by encouraging plaintiffs to bring class actions for statutory damages, Congress intended for TILA to have a more tangible public benefit rather than merely compensate the individual. Given this legislative intent, it cannot be maintained that putting Johnson's claim in a forum that prevents the bringing of a class action does not defeat the legislature's intent. The conflict between the FAA and TILA need not be express but can be, and is, deducible from the text and legislative history.

**B. TILA's Private Attorney Generals.**

Certainly, class actions are part of TILA's statutory scheme of enforcement by "private attorney generals." Compelling a claim alleged as a class to be arbitrated as an individual claim is disruptive with that scheme.

TILA's statutory mandate of disclosure of material terms is intended to benefit all consumers and compliant creditors, not just the individual claimant. *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982). The general statutory scheme envisions individual consumers acting as "private attorneys general." *Parker*, 673 F.2d at 1181. Congress intended to create a private attorney general class action right for the express purpose of "insur[ing] nationwide adherence to uniform disclosures" and providing a vehicle by which courts can "assess a meaningful penalty upon a creditor to induce compliance with" TILA's requirements. S. Rep. 93-278, 14-15. Enforcing arbitration here would defy congressional intent, and render TILA useless.

This congressional purpose has been recognized by every court to have considered the history of the act. An early case stating the purpose of TILA was *Ratner v. Chemical Bank*, 329 F. Supp. 270 (S.D.N.Y. 1971) where the Court held that "The scheme of the statute, *as both sides agree* (emphasis added), is to create a species of 'private attorney general' to participate prominently in enforcement . . . Congress made clear its broader scheme, and broader system of reimbursement, for private enforcement. It invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest. Following familiar precedents, it encouraged such actions by providing, in addition to the

incentive of public service, costs and a reasonable attorney's fee above the minimum recovery of $100." *Id.*

In *James v. Home Construction Co.*, 689 F.2d 1357 (11th Cir. 1982), the Court agreed with *Ratner*, and stated that "One of the congressional goals underlying TILA was the creation of a system of private attorneys general who could effectively enforce the Act without government intervention." *Sosa v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974); *Bizier v. Globe Fin. Services, Inc.*, 654 F.2d 1, 2 (1st Cir. 1981); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973).

In *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740 (5th Cir. 1973) the Court stated that "Section 1640 is intended to allow aggrieved consumers to participate in policing the Act. The domain of consumer credit with its allied commercial practices is no longer in the laissez faire era of caveat emptor. That doctrine is increasingly relegated to its proper place as a historical relic without modern application. The regulatory scheme forcefully expounds an emerging ethic of 'caveat vendor,' and we will not strain to avoid giving effect to the Federal Consumer Credit Protection Act." *Id.*; *see also Broughton v. Cigna Healthplans of California*, supra at 18.

## IV. PROLIFERATION OF ARBITRATION CLAUSES IN CONSUMER LOANS INSULATES CREDITORS FROM CLASS ACTION PENALTY

The penalty in a class action—the lesser of 1% of a defendant's net worth or $500,000—is certainly a substantive statutory remedy. The class members need not sustain actual damages. Congress intended class action

awards to operate as a fine and enforce nationwide compliance with uniform disclosures. The only route to imposing this fine is via a class action. While class actions have their basis in civil procedure, Congress clearly incorporated the device into its statutory scheme as opposed to funding an administrative agency to enforce compliance. In, for example, a products liability suit, the use of a class action is procedural, no statutory damages are available on a class wide basis. Here, Congress put in place a fine to be assessed in a class action to enforce its requirement for uniform disclosure of credit terms on a nationwide basis.

The proliferation of arbitration clauses in consumer credit transaction would undermine this statutory scheme because a class action cannot be brought in arbitration. The clauses appear in all types of consumer credit transactions, from credit cards to high interest (e.g. 900%), short-term loans. *See* "First USA Wins Majority of Arbitrated Cases," *The Austin American-Statesman*, March 12, 2000, at J8; *Thompson v. Illinois Title Loans, Inc.*, 2000 U.S. Dist. LEXIS 232 (N.D. Ill. January 6, 2000); *Fastfunding the Company Inc. v. Betts*, 2000 Fla. App. LEXIS 3771 (Fla. App. Ct. March 31, 2000).

By including an arbitration clause in each of its standard form contracts with consumer borrowers, a short-term lender that fails to disclose a security interest properly would not have to worry about liability as to each of it customers. It is likely only a small percentage of customers would discover the violation and a small percentage of those customers would actually bring suit. Consequently, the creditor would only have to defend one

or two individual suits per year in arbitration and could absorb that expense as a cost of doing business—doing business in violation of TILA that is. Again, no governmental agency is going to swoop in and shut down the lender because Congress did not decide to fund an agency for that purpose. Congress did decide to use the class action device to enforce compliance.

## CONCLUSION

WHEREFORE, Terry Johnson and the Illinois Consumer Justice Council, Inc. respectfully request that this Court affirm the Eleventh Circuit opinion for the reasons stated above.

Respectfully submitted,

DANIEL A. EDELMAN
*Counsel of Record*
CATHLEEN M. COMBS
JAMES O. LATTURNER
JOHN M. BRODERICK
EDELMAN, COMBS & LATTURNER
120 South LaSalle Street
18th Floor
Chicago, Illinois 60603
(312) 739-4200

*Attorneys for Amicus Curiae*
*Terry Johnson and the Illinois*
*Consumer Justice Council, Inc.*

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No. 99-1235

IN THE
**SUPREME COURT OF THE UNITED STATES**

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**GREEN TREE FINANCIAL CORP. -- ALABAMA and GREEN TREE FINANCIAL CORPORATION,**
*Petitioners,*

v.

**LARKETTA RANDOLPH,**
*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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# BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

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ELIZABETH RENUART
THE NATIONAL CONSUMER LAW CENTER
18 Tremont Street, #400
Boston, MA 02108
(617) 523-8010

Counsel for *Amicus Curiae*
THE NATIONAL CONSUMER LAW CENTER

STACY CANAN
JEAN CONSTANTINE-DAVIS
NINA F. SIMON*
DEBORAH ZUCKERMAN
AARP FOUNDATION LITIGATION

MICHAEL R. SCHUSTER
AARP

601 E Street NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP
*Counsel of Record

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No. 99-1235

IN THE

# Supreme Court of the United States

**GREEN TREE FINANCIAL CORP. -- ALABAMA and GREEN TREE FINANCIAL CORPORATION,**
*Petitioners,*

v.

**LARKETTA RANDOLPH,**
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICI CURIAE*[1/]

AARP is dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization serving older Americans, AARP is alarmed by the rampant fraud and deceptive practices perpetrated in a broad range of marketplace transactions, because these acts

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[1/] The parties' consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* AARP and the National Consumer Law Center state that no counsel for any party authored this brief in whole or in part and that no party or entity other than these *amici curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief.

disproportionately affect older consumers. AARP supports laws and public policies designed to protect their rights and to preserve the legal means to enforce them. AARP played an active role in the passage of recent amendments to the Truth in Lending Act ("TILA"), and participated in negotiations with industry and government representatives to improve disclosures and enhance substantive protections against abusive lending practices. AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

In recent years, AARP Foundation attorneys have represented countless older homeowners who have been victimized by abusive mortgage refinancings. These cases challenged: lender compliance with TILA disclosure obligations, including hiding a sixteen-point broker fee; charging a premium for credit life insurance of no value to the consumer; failing to provide the homeowner with a Notice of Right to Cancel; and failing to provide the three-day advance warning disclosure to a borrower with a high cost loan. Each of these loans was destined to go into default because the borrowers' mortgage payments ranged from 52 to 100 percent of their monthly incomes. The abusive lending practices described above are not diminishing but are becoming more widespread.

The effect of an arbitration agreement such as Green Tree's on these cases would have been devastating to the borrowers' ability to vindicate their TILA rights. Regardless of the fact that their arbitration costs ultimately might have been reimbursed, the initial outlay of fees would have barred these claimants from seeking redress.

The National Consumer Law Center ("NCLC") is a non-profit corporation established in 1969. One of its primary objectives is the provision of assistance to legal services attorneys, governmental agencies, and private attorneys in advancing the interests of their low-income and elderly clients in the area of consumer law. NCLC staff write and publish over thirteen legal treatises on various federal and state statutes that affect consumer law. In particular, *Truth In Lending* (4th

ed. 1999) and its earlier editions have provided insight and analysis of TILA for over two decades. This text was most recently relied upon by Chief Judge Posner in *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 935 (7th Cir. 1999). For over twenty years, NCLC staff have provided oral and written testimony to Congress and the Federal Reserve Board on the propriety of statutory and regulatory changes to TILA and Regulation Z. NCLC staff also have been members of the Federal Reserve Board's Consumer Advisory Council.

*Amici* are filing this brief because mandatory arbitration agreements, such as Green Tree's, conflict with the public purpose of TILA and its private enforcement mechanism.

## SUMMARY OF ARGUMENT

An arbitration clause that is silent regarding payment of arbitration fees and costs undermines the Congressional purpose of the Truth in Lending Act ("TILA"), if it imposes fee barriers that prevent claimants from vindicating their statutory rights. While companies that impose binding arbitration frequently tout it as a low-cost alternative to litigation, arbitration can be prohibitively expensive. When arbitration prevents a claimant from vindicating statutory rights conferred by a public interest statute like TILA, it impermissibly conflicts with TILA and its Congressional purpose.

Congress enacted TILA to provide consumers with information about the essential terms of their credit transactions and to deter deception and fraud in the credit marketplace. It has been a cornerstone of federal consumer protection law since its passage in 1968. TILA relies upon consumers acting as private attorneys general to police creditor compliance by providing individual and class remedies. The enforcement of TILA through damages provisions is made feasible by the Act's fee-shifting provision, which mandates the award of costs and reasonable attorneys' fees to a prevailing consumer.

The class action remedy is an essential component to enforcing TILA's protections and is a powerful deterrent to wrongful conduct. Indeed, class actions remain the only

realistic way for consumers with small monetary claims to vindicate their rights under, and to promote compliance with, TILA. Without class relief and mandatory fee-shifting, TILA would be reduced to nothing more than a mere nuisance to creditors, thus diminishing the Act's deterrent and remedial functions.

The Court has held that parties in arbitration are entitled to all substantive rights guaranteed by a statute such as TILA. The Eleventh Circuit's conclusion that an arbitration clause that imposes steep arbitrator or filing fees violates TILA's fee-shifting mandate is consistent with the Court's holdings and should be upheld.

## ARGUMENT

### I. CONGRESS ENACTED THE TRUTH IN LENDING ACT TO REGULATE CREDIT INDUSTRY PRACTICES AND PROTECT CONSUMERS.

The Truth in Lending Act [2] ("TILA" or "Act") has been a cornerstone of federal consumer protection law since its passage in 1968. TILA was enacted in response to the growing complexity in consumer credit in which many consumers were unable to discover the essential terms of their credit transactions, and in recognition that many unwitting consumers were routinely victimized by misrepresentations and fraudulent practices in the credit marketplace.[3]

Prior to 1968, consumers had no easy way to determine how much credit would cost or how to compare various loan products. Creditors did not calculate or advertise interest in a uniform way, nor was there a single system for defining what additional charges would be included in the interest rate. These

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[2] 15 U.S.C. § 1601 *et seq.*

[3] *See* H.R. Rep. No. 90-1040, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962; *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181-82 (11th Cir. 1982).

differences in computation significantly affected the cost to the consumer. For example, a three-year $6,000 car loan at 6% interest cost the consumer: $1,080 in interest if computed as an add-on rate; $1,317 in interest computed at a discount rate; and $570 in interest at a simple or actuarial rate. Consumers confronted with seemingly similar interest charges simply had no way to decipher which quoted rate of interest was the most expensive and could not compare terms and shop for credit.[4/]

Congress responded to this marketplace confusion, and sometimes outright deception, by enacting TILA. The statute represented an effort by Congress to strengthen competition among financial institutions and enhance the economic stabilization of the marketplace by the informed use of credit.[5/] This overarching public purpose was furthered by mandating the accurate, uniform, and meaningful disclosure of the costs of consumer credit.[6/]

The Act took a major step toward eliminating the interest rate deception noted above by prescribing a uniform calculation of interest as an annualized rate, by defining what kinds of credit-related charges should be included when calculating the annual percentage rate ("APR"),[7/] and by requiring that the total cost of these charges be disclosed as a dollar amount in the "finance charge."[8/] In Ms. Randolph's case, the creditor included a vendor's single interest insurance premium in the amount financed which should have been, but was not, included in the finance charge. This had the effect of artificially lowering the APR, making the loan look more

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[4/] *See* 109 Cong. Rec. 2027 (1963) (statement of Sen. Douglas).

[5/] 15 U.S.C. § 1601(a).

[6/] *Id.*; *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377 (1973).

[7/] 15 U.S.C. § 1606.

[8/] 15 U.S.C. §§ 1605, 1638.

attractive to Ms. Randolph than it actually was.

TILA confers statutorily-created private rights affecting the public interest,[9] creates a system of disclosure that improves the bargaining posture of all borrowers, and requires strict technical compliance.[10] Green Tree violated TILA's mandatory disclosure scheme by failing to accurately provide Ms. Randolph with the essential terms of her credit transaction.[11] TILA's enforcement mechanism was designed precisely to empower consumers like Ms. Randolph to challenge creditors' wrongful conduct. Because of the importance of its remedial purpose, courts throughout the country have liberally construed TILA in favor of borrowers.[12]

### A. TILA's Text, Purpose, and Legislative History Reflect the Pivotal Role of Private Attorney General Enforcement.

Congress intended that TILA's protections be enforced by consumers acting as private attorneys general.[13] Simply

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[9] *See Parker*, 673 F.2d at 1181; *Mills v. Home Equity Group, Inc.*, 871 F. Supp. 1482, 1486 (D.D.C. 1994).

[10] *See Parker*, 673 F.2d at 1181; *Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980).

[11] *See* 15 U.S.C. §§ 1631(a), 1637-39; Regulation Z, 12 C.F.R. § 226.18 (1997). *See also In re Underwood*, 66 B.R. 656, 660 (Bankr. W.D. Va. 1986).

[12] *See Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3d Cir. 1998); *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir. 1995); *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 (11th Cir. 1994); *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986); *Bizier v. Globe Fin. Servs., Inc.*, 654 F.2d 1, 3 (1st Cir. 1981).

[13] *See Edwards v. Your Credit, Inc.*, 148 F.3d 427 (5th Cir. 1998); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); *Aquino v.*

(continued...)

legislating required disclosures could not, by itself, compensate for the vast disparity in bargaining positions between consumers and lenders. The Act protects all consumers by deterring improper and deceptive behavior by all creditors.[14]

This private attorney general scheme includes the right to obtain actual damages, individual statutory damages, enhanced statutory damages for high-cost mortgages, class action damages, rescission, and an award of costs and attorneys' fees.[15] TILA represents a carefully constructed balance between the borrower's right to receive accurate and timely information about the cost of credit and the creditor's obligation to provide those disclosures without significant liability for small disclosure errors.[16] Petitioners and their *amici* advocate upsetting this statutory balance by allowing creditors to impose an arbitration scheme that thwarts consumers' ability to vindicate their rights as prescribed by TILA.

### 1. TILA Damages Effectuate Private Attorney General Enforcement.

From the outset, Congress primarily focused on the enforcement of the public interest in accurate disclosure through private attorney general lawsuits seeking statutory

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[13] (...continued)
*Public Fin. Consumer Discount Co.*, 606 F. Supp. 504, 508 (E.D. Pa. 1985); *French v. Wilson*, 446 F. Supp. 216 (D.R.I. 1978).

[14] *See Edwards*, 148 F.3d at 432; *Jenkins v. Landmark Mortgage Corp.*, 696 F. Supp. 1089, 1092 (W.D. Va. 1988); *French*, 446 F. Supp. at 220.

[15] *See* 15 U.S.C. §§ 1640(a), 1635.

[16] *See* 15 U.S.C. § 1605(f).

damages.[17] Over the years, courts have uniformly held that TILA is primarily enforced through these private attorney general lawsuits which are expressly fostered by the statutory damages, mandatory attorneys' fees and cost shifting provisions.[18]

Several aspects of these provisions are significant. First, damages are mandatory even for technical violations. Second, to obtain statutory damages, the consumer need not show that he or she was deceived by the violation or suffered any actual damages;[19] this evidences the Congressional goal of furthering the public purpose of the Act through private enforcement. Finally, the consumer need not exhaust any administrative remedies or provide advance notice to a creditor or agency before instituting a lawsuit.

In the thirty two years since the Act's passage, Congress has consistently reaffirmed its commitment that private attorney general enforcement is critical to creditor compliance with the Act. In 1974, Congress specifically endorsed class actions by adopting class statutory damages[20] and added an actual

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[17] Actual damages were not included in the original damages provision. Consumer Credit Protection Act., Pub. L. No. 90-321, § 130, 82 Stat. 146 (1968) (*codified as amended in* 15 U.S.C. § 1640).

[18] *See Begala v. PNC Bank*, 163 F.3d 948, 950 (6th Cir. 1998); *Ramadan*, 156 F.3d at 502; *Edwards*, 148 F.3d at 432; *Rodash*, 16 F.3d at 1144; *Herrara v. First Northern Sav. & Loan Ass'n*, 805 F.2d 896, 902 (10th Cir. 1986); *Bizier*, 654 F.2d at 2.

[19] *See Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982); *Smith*, 614 F.2d at 968; *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3d Cir. 1979).

[20] Act of Oct. 28, 1974, Pub. L. No. 93-495, 88 Stat. 1500 (*codified as amended at* 15 U.S.C.§ 1640(a)(2)(B)).

damages subsection.[21] In 1988, Congress imposed statutory damages for failing to provide consumers important information about home equity lines of credit.[22]

In 1994, Congress sought to curtail the rampant growth of predatory mortgage lending targeted at vulnerable consumers by offering special protections on "high cost" loans.[23] Congress deemed the new "high cost" disclosures and protections so important that it expanded the private attorney general scheme by creating mandatory enhanced statutory damages.[24] Finally, in 1995 Congress rejected industry efforts to undermine class actions, and doubled individual statutory damages in mortgage transactions.[25]

### 2. TILA's Fee-shifting Provisions Effectuate Private Attorney General Enforcement.

The mandatory award of costs and attorneys' fees to a prevailing borrower is one of the lynchpins of TILA's statutory enforcement. Fee-shifting gives an aggrieved borrower not only the right, but the ability, to act as a private attorney general.[26]

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[21] *Id.* at § 407(a) (*codified as amended* at 15 U.S.C. § 1640(a)(1)).

[22] Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (*codified as amended at* 15 U.S.C. § 1637a).

[23] 15 U.S.C. §§ 1602(aa), 1639.

[24] Enhanced damages under The Home Ownership Equity Protection Act ("HOEPA") are in addition to other statutory and actual damages. 15 U.S.C. §§ 1640(a), 1640(a)(4).

[25] Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (*codified as amended at* 15 U.S.C. § 1640(a)).

[26] *See McGowan*, 569 F.2d at 848.

The consumer can afford to contemplate acting as a private attorney general because, if successful, costs and reasonable attorneys' fees must be awarded regardless of the size of the statutory damages recovery.[27] In contrast, unsuccessful plaintiffs are not penalized with an assessment of attorneys' fees and costs.[28] As Justice O'Connor observed, private attorney general actions "ensure the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available." *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (concurring). "Success must be measured not only in the amount of money damages but also in terms of the significance of the legal issues . . . and the public purpose served by the litigation." *Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d at 1165. Under TILA's fee-shifting statutory scheme, the enforcement costs that might otherwise be borne by a government bureaucracy are instead imposed on the creditor which has acted improperly.[29]

### 3. TILA's Class Action Provision Effectuates Private Attorney General Enforcement.

Congress consistently has recognized that class actions are essential to TILA's self-enforcement scheme. The debate over the importance of class actions emerged almost immediately after passage of this landmark consumer credit legislation. In the early years of TILA litigation, most courts were unwilling to certify a class because of the massive potential liability that would have resulted from aggregating the mandatory minimum

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[27] *See, e.g., Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d 1164 (7th Cir. 1997).

[28] *See* 15 U.S.C. § 1640(a)(3).

[29] *See, e.g., Kessler v. Associates Fin. Servs. Co.*, 639 F.2d 498 (9th Cir. 1981); *Harris v. Tower Loan, Inc.*, 609 F.2d 120 (5th Cir. 1980).

$100 statutory damages for all class members.[30] The inflexibility of minimum statutory damages, coupled with the Act's silence regarding class actions, created uncertainty as to Congress's intent regarding the use of class actions. As a result, courts imposed numerous procedural restrictions to prevent class liability for TILA violations.[31]

In its Annual Reports to Congress, the Federal Reserve Board expressed concern about the trend to disapprove TILA class actions.[32] The Board stated that "if this trend were to continue, the deterrent of potential class action liability which helps to ensure creditor compliance with the Act would be effectively lost."[33] The Board focused on the "prophylactic effect of the threat of class action exposure [which] elevates a possible Truth in Lending law suit from the ineffective 'nuisance' category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance."[34] Congress agreed that "'potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide

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[30] *See* Ralph I. Rohner and Fred H. Miller, *Truth in Lending* 865-6 (Robert A. Cook, et al. eds., 2d ed. 2000).

[31] *Id.* at 866. *See, e.g., Shields v. First Nat'l Bank*, 56 F.R.D. 442, 446 (D. Ariz. 1972); *Wilcox v. Commerce Bank*, 55 F.R.D. 134, 138 (D. Kan. 1972); *Rogers v. Coburn Fin. Corp.*, 54 F.R.D. 417, 419 (N.D. Ga. 1972); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *see also Johnson v. Tele-Cash*, 82 F. Supp. 2d 264, 269 (D. Del. 1999).

[32] *See* 1972 F.R.B. Ann. Rep. on Truth in Lending 13-14; 1973 F.R.B. Ann. Rep. on Truth in Lending 9.

[33] 1973 F.R.B. Ann. Rep. on Truth in Lending 9.

[34] 1972 F.R.B. Ann. Rep. on Truth in Lending 13-14.

adherence to uniform disclosure.'"[35] At the same time, Congress expressly rejected the finance industry's proposal that TILA class actions be limited to those seeking actual damages or injunctive relief.[36]

Congress created a class action damages provision that carefully balanced TILA's purpose "to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy" with its concern that creditors not be subjected to enormous penalties for technical violations.[37] This provision specifically authorized class actions but limited the maximum damages awards. Far from indicating Congressional disapproval of the class action remedy, the limitation on statutory damages was the only mechanism that Congress deemed viable to express its manifest intent to *promote* class actions.[38] Indeed, through numerous amendments to TILA over the years, Congress has never deviated from this position.

Class actions have and continue to be a critical element in the enforcement of TILA. The right to aggregate claims for statutory damages has proven a potent ally to government efforts to prevent lenders from overstepping the bounds of

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[35] *See* S. Rep. No. 93-278, at 15 (1973), *quoting* 1972 F.R.B. Ann. Rep. on Truth in Lending 13.

[36] *Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong. 188 (1973) (statement of Robert Norris, General Counsel, National Consumer Finance Association).

[37] S. Rep. No. 93-278 to accompany S. 2101, Truth in Lending Act Amendments 14-15 (June 28, 1973).

[38] *See* S. Rep. No. 94-590 at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431. (When Congress amended the class action provision to increase available damages, it "wishe[d] to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device.") *See also Johnson*, 82 F. Supp. 2d at 269.

TILA and straying into deceptive practices. In recent years, the payday loan industry has aggressively expanded from small local businesses to major national financial organizations.[39] These companies, whose loans are characterized by exorbitant rates, ranging from 261% to 782%,[40] adamantly had refused to provide TILA disclosures that would have revealed to borrowers their astronomical rates of interest.[41] Characterizing these transactions as "deferred presentments" or "cash leasing," these banks and finance companies sought to disguise the true nature of payday loans, asserting that TILA disclosures were unnecessary. Class action lawsuits propelled this issue to the foreground[42] and ultimately resulted in the Federal Reserve Board's issuing new Commentary[43] that stated the obvious – payday loans are consumer credit transactions and consumers

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[39] *See* Jean Ann Fox, Consumer Fed'n of Am., *The Growth of Legal Loan Sharking: A Report on the Payday Loan Industry* 2-3 (1998); Jean Ann Fox, Consumer Fed'n of Am., *Safe Harbor for Usury: Recent Developments in Payday Lending* 4 (1999), www.consumerfed.org.

[40] Jean Ann Fox, *The Growth of Legal Loan Sharking*, *supra*, at 7; *see also Hamilton v. York d/b/a/HLT Check Exchange*, 987 F. Supp. 953 (E.D. Ky . 1997); *In re Miller*, 215 B.R. 970 (Bankr. S.D. Ky. 1997).

[41] *See, e.g., Turner v. E-Z Check Cashing*, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999); *Hamilton*, 987 F. Supp. 953.

[42] *See, e.g., White v. Cash Emporium*, CA No. 98-269 (E.D. Ky. 1998); *Dortman v. Cash, Inc.*, CA No. 96-CV-188(R) (W.D. Ky. 1996); *Mumford v. McKenzie Check Advance*, Z-220-96 (Cir. Ct. Knox Cty., Tenn. 1996); *Goins v. Creditcorp*, V-96-175 (Cir. Ct. Bradley Cty., Tenn. 1996); *see also Johnson*, 82 F. Supp. 2d at 264.

[43] *Official Staff Commentary on Regulation Z § 226.2(a)(14)-2*, 65 Fed. Reg. 17129, 17130 (2000). The Board clearly stated that this commentary was not a change in the law.

are entitled to TILA disclosures that inform them of the true cost of that very expensive form of credit.[44/]

The public enforcement purpose of the class action remedy has been apparent from the outset. The class representative under TILA, who shepherds a case through complex litigation while receiving a smaller damages amount than in an individual case,[45/] cannot be said to be acting other than in the public's interest. Consistent with this notion, many TILA class action lawsuits effectively have raised and challenged abusive industry practices such as charging consumers for a deceptive insurance product,[46/] manipulating TILA disclosures to hide credit costs instead of disclosing them,[47/] and burying grossly inflated charges in the price of the goods sold.[48/] In the absence of class action lawsuits, many of these abusive practices would continue unabated.

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[44/] Similarly in the arena of automobile "title pawn" loans, consumer lawsuits highlighted that industry's unwillingness to comply with TILA's disclosure scheme. *See. e.g., Barlow v. Quik Pawn Shop*, 992 F. Supp. 1299 (M.D. Ala. 1997); *In re Lannice Fryer*, 183 B.R. 322 (Bankr. S.D. Ga. 1995). The Federal Reserve Board amended its Commentary to emphasize that pawns loans are consumer credit transactions under TILA. *Official Staff Commentary on Regulation Z § 226.17(c)(1)-18*, 61 Fed. Reg.14956 (1996).

[45/] *See Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121 (D. Haw. 1976).

[46/] *See Adams v. Plaza Fin. Co.*, 168 F.3d 932 (7th Cir. 1999); *Edwards*, 148 F.3d 427.

[47/] *See Minnesota v. First Alliance Mortgage Co.*, C9-98-11416 (Dist. Ct., 2d Judicial Dist. Minn. Mar. 10, 1999) (order for final judgment); www.ag.state.mn.us.

[48/] *See Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000); *Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927 (7th Cir. 1998).

## II. ARBITRATION AGREEMENTS SUCH AS GREEN TREE'S THAT PREVENT CONSUMERS FROM EFFECTIVELY VINDICATING THEIR STATUTORY RIGHTS UNDERMINE THE TRUTH IN LENDING ACT'S REMEDIAL PURPOSE.

The Court has recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congressional intent that a statute not be subject to a waiver of the right to a judicial forum can be gleaned from a statute's text or its legislative history, or from "an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Following this Court's direction, several federal courts have found arbitration provisions unenforceable when they undermined important statutory rights.[49/]

### A. Arbitration Contracts That Require Claimants to Pay Fees Undermine TILA Enforcement.

An arbitration clause, like the one in the instant case, that is silent regarding payment of arbitration fees and costs undermines the Congressional purpose of TILA if it imposes fee barriers that prevent claimants from vindicating their statutory rights. While companies that impose binding arbitration frequently cite it as a low-cost alternative to litigation, many courts have recognized the real costs of

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[49/] *See, e.g., Shankle v. B-G Maintenance Management, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Baron v. Best Buy Co., Inc.*, 75 F. Supp. 2d 1368, 1370-71 (S.D. Fla. 1999), *appeal stayed*, No. 99-14028-E (11th Cir. June 2, 2000). *Cf. Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484-85 (D.C. Cir. 1997).

arbitration and how the imposition of those costs and fees can prevent claimants from vindicating rights under statutes protecting public interests.

*Cole v. Burns International Security Services*, 105 F.3d 1465, 1480 (D.C. Cir. 1997), involved an arbitration agreement like Green Tree's which was silent as to costs. The parties in that Title VII civil rights case stipulated that arbitrators' fees are commonly $500 to $1,000 per day. The court found that an employee facing expensive filing and administrative fees, which are substantially in excess of the fees paid in federal court, is unlikely to pursue his or her statutory claims in an arbitral forum. *Id.* at 1484. In fact, the Court was:

> unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

*Id.* (footnotes & citations omitted). To effectuate the liberal policy favoring arbitration agreements without impairing the claimant's statutory rights, the D.C. Circuit Court interpreted the arbitration agreement to require the employer to bear the full expense of the arbitral fees and costs. *Id.* at 1485.

The Tenth Circuit confronted a similar, but more intractable problem in *Shankle v. B-G Maintenance Management, Inc.*, 163 F.3d 1230 (10th Cir. 1999), where it found that an arbitration agreement requiring an employee to pay half of an arbitrator's fees, which included a $6,000 deposit, $250 per hour of arbitrator time, $125 per hour for arbitrator travel time, and $45 per hour for paralegal time, placed him:

> between the proverbial rock and a hard place – it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. . . . B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws.

*Id.* at 1235. Because the fee-splitting provisions of the arbitration agreement explicitly conflicted with the statutory fee-shifting provisions, the *Shankle* court, unlike the court in *Cole*, was unable to craft a saving interpretation.

High up-front costs[50/] create a formidable barrier to a consumer's ability to vindicate statutory rights. These costs present a particular problem for the many consumers whose relatively small claims are substantially less than the cost of proceeding to arbitration. For this reason, arbitration clauses that are silent as to fees and costs should be unenforceable *unless* such clauses are interpreted to "ensure that [a consumer's] ability to vindicate her statutory rights [under TILA] will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999). In the

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[50/] For example, the American Arbitration Association (AAA) requires that claimants who request an in-person hearing for a small claim pay all fees and costs. In disputes valued at between $10,000 and $100,000, a consumer must pay a filing fee of $500 to $1,250, a daily hearing fee of $150, a daily room rental fee of $150, and a portion of the arbitrator's fee of $100 to $350 per hour. AAA, *Commercial Dispute Resolution Procedures* (visited July 20, 2000) <http://www.adr.org/rules/commercial/commercial_rules.html>. *See also* John Vail, *Defeating Mandatory Arbitration Clauses*, 36 Trial 70, 71 (Jan. 2000); *Cole*, 105 F.3d at 1484 n.13.

absence of such a ruling from this Court, the Eleventh Circuit was not persuaded by Green Tree's statement at oral argument that the arbitration award might ultimately apportion the fees as directed by TILA. There is "no guarantee that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order, despite the small sum that is likely to be the object of the dispute in arbitrations of this kind." *Id.* Moreover, even an allocation of fees in accordance with TILA at the *end* of arbitration does not remove the entry barriers which ensue when a claimant must *advance* costs as a condition precedent to initiating the case.

Allowing Petitioners to impose such costs on consumers renders null the Court's statement in *Gilmer* that arbitration must not effect a loss of the "'substantive rights afforded by the statute. . . .'" 500 U.S. at 26 (*quoting Mitsubishi*, 473 U.S. at 614). In *Gilmer*, the standard practice was for employers to pay all the arbitration costs and fees under the NYSE and NASD rules.[51] The Court, therefore, was not confronted with the chilling effect upon a complainant being forced into an unreasonably expensive arbitration proceeding.

Petitioners and their *amici* simply dodge this issue. They fail to acknowledge the hardship – indeed the impossibility – for the average consumer to advance the fees that often far exceed the amount of the claim. Instead, they fast-forward the discussion down the time line and postulate a rosy scenario for the successful borrower in arbitration. They incorrectly argue that the right to costs and attorneys' fees is assured by the language of the arbitration agreement that " the arbitrator shall have all powers provided by the law and the Contract." *Randolph*, 178 F.3d at 1151. On the contrary, this language suggests that a great deal of discretion is accorded the arbitrator who need not follow the law. This slight of hand ignores the impact of up-front costs on borrowers. Arbitration that fails to clearly adopt the mandatory fee-shifting guarantees of TILA seriously undermines the statute's primary enforcement mechanism.

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[51] *See Cole*, 105 F.3d at 1483.

## B. Arbitration Contracts That Preclude Class Actions Undermine TILA Enforcement.

The Court has endorsed the important role of class actions:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

*Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted).[52/]

TILA claims often are brought for small dollar amounts, to remedy deceptive practices aimed at the most vulnerable members of our society. Class actions were designed for this very situation, cases brought by "impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant, one that . . . otherwise might get away with piecemeal highway robbery by committing small violations that were . . . beyond [the] ability or resources [of individual plaintiffs] to remedy." *Jackson v. Check' N Go, Inc.*, No. 99-C-7319, 2000 WL 782927, at *3 (N.D. Ill. June 13, 2000).

The class action remedy is not merely a procedural device; it is an important *substantive* right under TILA.

> Whether or not a class action is available as a remedy is a substantive issue relating to congressional intent. . . . It is hard to believe that

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[52/] *Accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

> the question of whether TIL damages should be collected en masse is no more than a procedural issue.... Any uncertainty on this score should be resolved by the specific class action recovery provisions in section 130(a)(2) of the TIL Act.

Ralph I. Rohner and Fred H. Miller, *Truth in Lending* 871 (Robert A. Cook, et al. eds., 2d ed. 2000). As a substantive right under TILA, class actions must be available to consumers either in the judicial or arbitral forum.[53]

The TILA class action right is threatened by the interpretation of federal courts that have held that class arbitration may proceed only if specifically authorized by the agreement or its applicable rules.[54] Even when the agreement is silent on the issue, like the Green Tree agreement, federal courts have enforced the agreement but disallowed class arbitration[55] notwithstanding that enforcement may result in nullifying important statutory rights.[56] Failing to heed the

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[53] *Gilmer* is distinguishable because, unlike TILA, the ADEA imposes barriers to class actions. The ADEA allows only opt-in class actions preceded by 60-day notice to the EEOC. The EEOC then "shall promptly seek ... informal methods of conciliation, conference, and persuasion" and EEOC commencement of an action terminates the private class action. 29 U.S.C. §§ 626(b), (c), (d).

[54] *See Baesler v. Continental Grain Co.*, 900 F.2d 1193,1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (*per curiam*); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

[55] *See Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991).

[56] *See, e.g., McCarthy v. Providential Corp.*, No. C-94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994); *Gammaro v. Thorp Consumer*

(continued...)

Court's warning that parties to an arbitration agreement should not be forced to forgo substantive statutory rights and that "all statutory claims may not be appropriate for arbitration," *Gilmer*, 500 U.S. at 26, many courts have misconstrued the liberal federal policy favoring enforcement of arbitration agreements

Only a few federal courts, including the Eleventh Circuit in *Randolph*, have taken care to balance the federal policy favoring arbitration while upholding statutory integrity. In *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999), a putative class action alleging the failure to disclose excessively high interest rates, the court carefully reviewed TILA's legislative history and damages provisions when considering the enforceability of an arbitration agreement that prohibited class action relief. While mindful of the liberal policy favoring enforcement of arbitration agreements, the court appropriately found that the agreement "would contravene the express congressional intent to 'encourage the use of class actions as an important tool for enforcing Truth in Lending.'" *Id.* at 267, *quoting Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1120 (D. Haw. 1976). Without class relief, TILA would be stripped of its "sting" and reduced to nothing more than a mere nuisance to creditors, thus diminishing the Act's deterrent and remedial functions. *See Johnson*, 82 F.2d at 270.

The reluctance of many federal courts to recognize the key role of class actions in vindicating important statutory rights that affect the public interest will have a devastating effect upon consumers.[57] If consumers are forced into the arbitral forum

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[56] (...continued)
*Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993).

[57] Unlike some federal courts, many state courts have found that class action arbitration is allowed under the FAA. *See, e.g., Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd sub nom. on other grounds, Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998), *cert. denied*, 527 U.S.
(continued...)

without the right to seek class-wide relief, creditors will be able to avoid TILA compliance with impunity.[58/]

### 1. Arbitration Is Not Suitable for Class-wide Adjudication.

Class-wide adjudication is not suitable for arbitration as long as the due process rights of absent class members are not protected. Unless arbitrators guarantee these rights and follow Fed. R. Civ. P. 23, claims under TILA and other statutes imbued with a public purpose cannot, consistent with the Constitution and Congressional intent, be forced into arbitration.

The representative nature of class actions creates particular due process concerns. Special steps must be taken to protect the interests of individuals who will be bound by the outcome of a suit to which they were not a party. These steps include notice, an opportunity to opt out, and assurance that the named plaintiff(s) adequately represent the interests of absent class members at all stages of the litigation. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 817, 846 (1999); *Phillips Petroleum v. Shutts Co.*, 472 U.S. 797, 811-12 (1985); *Eisen*, 417 U.S. at 173-74. Unless arbitrators can fulfill this role, class actions cannot be forced into arbitration.

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[57/] (...continued)
1003 (1999); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 320-22 (Ct. App. 1986); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991).

[58/] *See In re Knepp*, 229 B.R. 821, 842 ( Bankr. N.D. Ala. 1999) ("The pervasive use of arbitration agreements in consumer contracts could have the effect of eliminating class actions. If class actions are no longer an option, the vast majority of consumer claims involving relatively small sums of money on an individual basis will be left without a remedy.").

### 2. The Demise of Class Actions Would Create a Void In TILA Enforcement.

Petitioners' *amici* have asserted that regulatory enforcement of TILA eliminates the need for class actions. *See, e.g.*, Brief of the Chamber of Commerce of the U.S. at 18-19. These assurances simply do not ring true. The Federal Trade Commission ("FTC"), which has primary enforcement authority over many thousands of consumer finance companies,[59] such as Green Tree, has had few resources allocated for enforcement. As a result, its Division of Financial Practices was able to bring only twenty eight TILA cases between January 1998 and December 1999.[60]

The suggestion that the regulatory agencies are covering the field in enforcing TILA is contradicted by industry testimony before Congress. "First and foremost, these laws, and related regulations, need to be enforced more vigorously. Most abuses could be handled quite effectively by better enforcement."[61] Indeed, the one recommendation on which all industry representatives agreed was that greatly enhanced enforcement is needed, not new legislation.[62] In the face of this testimony,

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[59] 15 U.S.C. §§ 45(a), 1607.

[60] *See* App. 1: Jan. 15, 1999 and Jan. 6, 2000 letters from the Chairman of the FTC to the Director of the Federal Reserve Board's Division of Consumer and Community Affairs (signatures on originals).

[61] *Predatory Lending Practices in the Subprime Industry: Hearings before the House Comm. on Banking and Fin. Servs.* (May 24, 2000) [hereinafter *Predatory Lending Practices*] (testimony of Laura Borelli, Nat'l Home Equity Ass'n).

[62] *Predatory Lending Practices*, *supra* (testimony of Ralph Rohner, Consumer Bankers Ass'n; David Bochnowski, America's Community Bankers; Neill Fendly, National Ass'n of Mortgage Brokers).

the contention of *amici* that class actions are no longer necessary cannot be taken seriously.[63]

### C. Unwritten Arbitration Decisions Undermine TILA Enforcement.

TILA cases are intended to protect the public at large, focusing primarily on interpreting the Act and regulations, and only secondarily on the facts.[64] When, however, arbitration is conducted in private and written decisions are not required, it is difficult, if not impossible, to determine whether an aggrieved party's substantive rights have been upheld in the arbitral forum.[65]

"[P]ublished [TILA] case law is necessary to provide guidance to banks," and private, unpublished decisions "eliminate[ ] that source of guidance." Budnitz, *supra*, at 326.[66] The public resolution of cases involving laws that uphold the public's interest help to guide our society.[67] "[W]ritten opinions . . . apply necessarily vague positive law to concrete fact situations." Brunet, *supra*, at 20. The development of law "has a significant purpose to 'channel

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[63] State attorneys general enforcement authority under TILA is limited to redressing violations in connection with "high cost" mortgage loans. *See* 15 U.S.C. § 1640(e).

[64] *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, Ohio St. J. on Disp. Resol. 267, 325 (1995). *Cf.* Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardozo L. Rev. 481, 492 (1981).

[65] *See* Budnitz, *supra*, at 319.

[66] *See also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tul. L. Rev. 1, 17 (1987).

[67] *See* Brunet, *supra*, at 20.

behavior in such manner as to prevent or avoid conflict.'" *Id.* (citation omitted).

In *Gilmer*, the Court was not confronted with an arbitral forum that failed to provide written public decisions. 500 U.S. at 31-32. Unlike the Green Tree arbitration agreement, the *Gilmer* arbitration was to be conducted pursuant to the NYSE rules requiring that all arbitration awards be in writing, contain sufficient information describing the nature and resolution of the case, and be made public. *Id.* Moreover, the Court found that "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." *Id.* at 32.

*Gilmer* stands in sharp contrast to the present case where pre-dispute arbitration clauses have become commonplace in consumer transactions. "It is anticipated that virtually all major banks and lending institutions will implement consumer arbitration procedures within the next five years."[68] As a result, consumers are no longer able to avoid arbitration by taking their business elsewhere.[69]

The widespread use of consumer arbitration agreements could remove the judiciary's influence from entire industries or economic relationships.[70] The courts have been instrumental

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[68] Alan S. Kaplinsky & Mark J. Levin, *Excuse me, but who's the predator? Banks can use arbitration clauses as a defense*, 7 Bus. L. Today 24, 28 (May/June 1998).

[69] Senator Feingold stated that "consumer credit lenders are increasingly requiring their customers to use binding arbitration when a dispute arises. . . . [T]he practice is becoming so pervasive that consumers may soon no longer have an alternative, unless they forego use of a credit card or a consumer loan entirely." 146 Cong. Rec. S930, 933-34 (daily ed. Feb. 29, 2000) (statement of Sen. Feingold).

[70] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled*

(continued...)

in defining TILA provisions that serve to protect consumers and guide creditors. If the development of TILA law ceases, the purpose of TILA to provide uniform rules may also cease.

> A statute is a legislative policy choice, but without subsequent judicial development through the public resolution of disputes, that policy will remain stagnant, or perhaps wither entirely. . . . Even if initial principles are established through adjudication, permitting the arbitration of an entire category of claims restricts further evolution in that area of the law by reducing the number and variety of claims presented to the courts.

John V. O'Hara, *The New Jersey Alternative Procedure For Dispute Resolution Act: Vanguard of a 'Better Way'?*, 136 U. Pa. L. Rev. 1723, 1746 (1988). Indeed, arbitration resolution, without written public decisions, undermines the principle of *stare decisis*, which preserves our body of law. *Stare decisis* "promotes evenhanded, predictable and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). As Justice Powell noted, "*[S]tare decisis* is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior." Justice Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 286 (1990).

In order to preserve the public policy foundation of TILA and provide compliance guidance for creditors, arbitrators resolving cases must apply the statutory law and issue written opinions that are publicly available.

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[20] (...continued)
*Arbitration*, 1997 Wis. L. Rev. 33, 59 (1997).

### D. Green Tree's Arbitration Clause is Typical of Those Designed to Prevent Consumers From Acting as Private Attorneys General Under TILA.

The current trend of lenders and other businesses to impose binding arbitration on their customers in order to prevent litigation is indisputable.

> Consumers have been ganging up on banks. But now the institutions have found a way to defend themselves. . . . Arbitration is a powerful deterrent to class action lawsuits against lenders because the great weight of authority holds that arbitrations cannot be conducted on a class basis unless the parties have agreed to do so. . . . Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.

Kaplinsky & Levin, *supra*, at 24-26, 28.

Green Tree's success in adopting this approach to avoid legal consequences for its lending practices cannot be overlooked. Arbitration agreements have enabled Green Tree to avoid scrutiny of its alleged widespread deceptive practices in the financing of home improvement contracts and mobile home sales throughout the nation.[7]/ Having successfully forced many lawsuits into the arbitral forum, Green Tree is now actively seeking to deprive claimants of their substantive right to pursue these claims as class actions. Green Tree has

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[7]/ *See, e.g., Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (home improvement); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655 (S.D. Miss. 2000) (mobile home); *Green Tree Fin. Corp. v. Holt*, 171 F.R.D. 313 (N.D. Ala. 1997) (class mobile home); *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) (class mobile home).

vigorously opposed the prosecution of these claims through class arbitration.[22]

Green Tree's use of the arbitral forum to compel consumers to "forego the substantive rights afforded by the statute" is in direct conflict with the Court's decisions in *Mitsubsishi*, 473 U.S. at 628, and *Gilmer*, 500 U.S. at 26. Green Tree's improper use of arbitration undermines the very essence of TILA's private attorney general scheme. Green Tree has, in effect, bypassed the legislative and judicial processes to alter the legal system to meet its own goals and to protect its "bottom line" regardless of – or precisely because of – the merits of numerous customers' claims. This behavior must not be countenanced by the Court.

## CONCLUSION

Consumers' statutory rights under TILA cannot be defeated through the mechanism of the arbitral forum. Consumers who are required to pursue their TILA claims in arbitration must be accorded their full rights and remedies under the statute, including fee-shifting and the pursuit of class claims, and protection of their due process rights in class arbitrations. As long as these rights, remedies, and protections are not afforded

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[22] Subsequent to the Third Circuit's decision in *Harris*, 183 F.3d 173 (3d Cir. 1999), Green Tree has opposed allowing these arbitrations to proceed on a class-wide basis. There are no citations to these proceedings because arbitration is not public. *See also Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) (a class action proceeded to class arbitration over Green Tree's objection). *See* App. 2: Green Tree's Mem. Opp. to Class Arbitration (signature on originals).

under arbitration agreements, consumers must be permitted their day in court.

July 24, 2000

Respectfully submitted,

Elizabeth Renuart
The National Consumer
Law Center
18 Tremont Street
Boston, MA 02108
(617) 523-8010

Counsel for *Amicus Curiae*
The National Consumer
Law Center

Nina F. Simon*
Stacy Canan
Jean Constantine-Davis
Deborah Zuckerman
AARP Foundation
Litigation

Michael R. Schuster
AARP

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus*
*Curiae* AARP

*Counsel of Record

# APPENDIX 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

January 15, 1999

Dolores S. Smith, Director
Division of Consumer and Community Affairs
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

Dear Ms. Smith:

This letter responds to your request for information regarding the enforcement activities of the Federal Trade Commission under the Truth in Lending, Consumer Leasing, Equal Credit Opportunity, and Electronic Fund Transfer Acts ("Acts") during the past year for use in preparing the Federal Reserve Board's ("Board") Annual Report to Congress. You have asked for information regarding the Commission's enforcement activities pursuant to those Acts, including methods of enforcement and significant enforcement actions and the extent to which compliance is achieved by entities subject to the Commission's enforcement authority. Also, you have asked whether the Commission recommends any changes to these laws or their implementing regulations or wishes to provide any other comments or observations.

## I. A DESCRIPTION OF THE COMMISSION'S ENFORCEMENT ACTIVITIES UNDER THE ACTS DURING THE PAST YEAR

Truth in Lending Act and Consumer Leasing Act

Since January 1998 up to the present, the Commission filed a complaint in federal district court charging a Washington, D.C. mortgage lender and its owner, inter alia, with violating the Truth In Lending Act ("TILA") and Regulation Z and the Federal Trade Commission Act ("FTC Act"), in connection with alleged deceptive and unfair practices in home mortgage lending. The Commission also issued final decisions and orders in thirteen administrative cases concerning alleged deceptive lease and/or credit advertising in violation of the FTC Act, and failure to clearly and conspicuously disclose and/or failure to make available advertised lease and/or credit terms, in violation of the Consumer Leasing Act ("CLA") and Regulation M and/or the TILA and Regulation Z. The above cases are discussed below. Other investigations of possible TILA and/or CLA violations are ongoing.

In Federal Trade Commission v. Capital City Mortgage Corp. ("Capital City Mortgage"),[1/] the Commission filed a complaint in United States District Court for the District of Columbia against a Washington, D.C. area mortgage company and its owner, Thomas K. Nash, alleging numerous violations of federal laws, inter alia, the TILA and

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[1/] No. 98CV00237 (D.D.C. filed Jan. 29, 1998).

Regulation Z and the FTC Act.[2/] The complaint alleges that defendants' borrowers, in many instances, are minority and/or elderly persons living on fixed or low incomes and that defendants' loans include interest rates that generally ranged between 20-24 percent, for loans secured by home equity, and 9-12 percent, for purchase money loans. According to the complaint, in many instances, defendants' transactions involve interest-only balloon, rather than amortizing, loans. The complaint alleges, inter alia, that defendants, in many instances, violated the TILA and Regulation Z, and engaged in unfair or deceptive acts or practices in violation of the FTC Act, by: 1) understating the annual percentage rate and finance charge; 2) overstating the amount financed; 3) failing to disclose or accurately disclose the payment schedule or the total of payments (including but not limited to failing to disclose a balloon payment); 4) failing to provide disclosures before consummating the transaction and in the required format; 5) failing to provide disclosures that accurately reflect the legal obligation; and 6) failing to provide or correct certain "good faith"disclosures.

The complaint also alleges that defendants engaged in other deceptive or unfair practices in offering and extending credit and throughout the duration of the loans, in violation of the FTC Act, with the result that a number of borrowers were overcharged on their loans, were defaulted, and had title to their homes or other property impaired or completely lost (along with the equity). These alleged deceptive or unfair practices include: 1) representing a loan as an amortizing

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[2/] The complaint in this matter also alleges, inter alia, violations of the Equal Credit Opportunity Act. See infra p. 7.

loan when, in fact, it was an interest-only balloon loan; 2) representing that loan payments were higher than they should have been under the loan instruments by demanding that borrowers pay for services not provided, for charges imposed by the government or related entities on defendants prior to the borrowers' purchase of the property, and for no-insurance penalties when defendants were to provide the insurance or the borrower had timely purchased insurance; 3) collecting real estate tax escrow payments, failing to pay the taxes and representing that the taxes had been paid; 4) refusing to explain overcharges; 5) initiating foreclosure proceedings after nonpayment of overcharges and obtaining title by foreclosure or taking a deed in lieu thereof; 6) adding charges to arrears or loan principal and accruing compound interest and increasing the pay-off amount; 7) receiving sufficient pay-off amounts but refusing to release the lien without further payment; and 8) refusing to reinstate a borrower after the borrower paid the reinstatement fee.

The complaint asks the court to award, inter alia, the amount necessary to prevent unjust enrichment and consumer redress (including refunds of monies paid, disgorgement of ill-gotten gains, and rescission of contracts) and to permanently restrain defendants from future law violations. The case is now in the discovery phase; a trial date has not yet been set.[3/]

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[3/] The case has been joined, for purposes of discovery, with a private lawsuit, Hargraves v. Capital City Mortgage Corp., No. 98CV1021 (D.D.C. filed Apr. 24, 1998).

In Chrysler Corporation, Inc. ("Chrysler"),[4] Bozell Worldwide, Inc. ("Bozell"),[5] and Martin Advertising, Inc. ("Martin"),[6] the Commission issued final decisions and orders in three cases involving alleged deceptive lease and/or credit advertising in the automobile industry, in violation of the CLA and Regulation M and/or the TILA and Regulation M and the FTC Act. The complaints charged that Chrysler and Bozell, its national advertising agency, and Martin, a regional advertising agency for General Motors's dealerships and dealer associations, created and disseminated deceptive lease and/or credit advertisements that promoted various terms (including monthly payment amounts) and omitted key cost terms or buried this information in fine, and at times unreadable, print, in violation of the CLA and Regulation M and the FTC Act. Chrysler and Bozell also were charged with misrepresenting that the luxury vehicle model displayed in ads was available at the prominent, low lease terms, in violation of the FTC Act. In fact, according to the complaint, the low monthly payments applied to Chrysler models of lesser value than those featured in the ads, and information about lease inception fees and other terms appeared only in unreadable fine print and was not clear and conspicuous, in violation of the CLA and Regulation M and the FTC Act.

The complaint against Martin also alleges that the company violated the FTC Act, the CLA and Regulation M, and the TILA and Regulation Z regarding its automobile lease and credit advertising. The complaint charges that Martin's

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[4] FTC Docket No. C-3847 (Jan. 13, 1999).

[5] FTC Docket No. C-3845 (Jan. 13, 1999).

[6] FTC Docket No. C-3846 (Jan. 13, 1999).

television and radio lease ads were deceptive by: 1) misrepresenting that consumers could purchase a vehicle by paying low monthly payments, when, in fact, the offers involved leases and the ads omitted this fact or hid the information in fine print or rapidly-stated audio disclosures; 2) misrepresenting the amount consumers were required to pay at lease inception; and 3) omitting or hiding important information about lease inception fees in unreadable fine print or incomprehensible audio disclosures. The complaint also alleges that Martin's balloon payment credit ads were deceptive and falsely represented that consumers could buy a car by making only low monthly payments, inadequately disclosing the existence and amount of a final balloon payment, a substantial down payment, the annual percentage rate, or other terms of repayment. The complaint further alleges that Martin's lease and credit ads violated the CLA and Regulation M and TILA and Regulation Z by omitting required disclosures or making disclosures that were not clear and conspicuous and by failing to state a rate of finance charge as an annual percentage rate or "APR."

The orders with Chrysler, Bozell, and Martin prohibit misrepresentations of the total amount due at lease signing or delivery, the amount down and/or down payment, and the capitalized cost reduction or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required). The orders also prohibit the companies from stating any charge that is part of the total due at lease signing or delivery, or that no such charge is required (other than a statement of the periodic payment) more prominently than a statement of the total amount due at lease signing or delivery. The orders also prohibit the companies from stating the amount of any payment unless the ad also states, clearly and conspicuously, all of the terms required by the CLA and

Regulation M. In addition, the orders in Chrysler and Bozell prohibit these companies from misrepresenting the vehicle model available to consumers in connection with any advertised lease offer. In Martin, the order also prohibits the company from misrepresenting that any motor vehicle lease advertisement pertains to a cash or credit offer. This order also prohibits the company from misrepresenting the existence and amount of any balloon payment or the annual percentage rate. In addition, the order prohibits Martin from stating the monthly payment or other credit terms without, clearly and conspicuously, stating all of the terms required by the TILA and Regulation Z. Under all three orders, the disclosures required by the CLA or TILA for lease and/or credit advertising must be made "clearly and conspicuously"-- that is, in a manner that is readable (or audible) and understandable to a reasonable consumer.

In Grey Advertising, Inc. ("Grey"),[7/] Rubin Postaer and Associates, Inc. ("Rubin Postaer"),[8/] and Foote, Cone and Belding, Inc. ("FCB"),[9/] the Commission issued final decisions and orders with three national advertising agencies resolving charges that they violated the CLA and Regulation M and/or the TILA and Regulation Z and the FTC Act by misrepresenting, hiding, and failing to disclose adequately the true terms of their advertised automobile lease and credit deals. The orders settled charges that these companies developed and disseminated deceptive advertisements for "zero down," "penny down," or other low amounts due at

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[7/] FTC Docket No. 3793 (Apr. 6, 1998).

[8/] FTC Docket No. 3794 (Apr. 6, 1998).

[9/] FTC Docket No. 3792 (Apr. 6, 1998).

inception in lease advertisements for Mitsubishi Motor Sales of America, Inc., American Honda Motor Corporation, and Mazda Motor of America, Inc., respectively. In Grey, Rubin Postaer, and FCB, the Commission alleged that the lease ads misrepresented the true amounts that consumers were required to pay at inception and did not adequately provide material cost information necessary to prevent misleading consumers who had to pay significant fees. According to the allegations, the ads presented information about these additional fees only in unreadable print that appeared: 1) in type too small; 2) for too short a duration; 3) in quick "scrolling"text; 4) against moving or distracting backgrounds; and/or 5) in a location far removed from the more prominent representations. The complaint against Grey also alleged that this company created and disseminated deceptive automobile balloon payment credit advertisements. The Commission alleged that these credit ads misrepresented that consumers could buy a car by making low monthly payments and paying low amounts "down" and did not adequately disclose the existence and amount of a several thousand dollar final balloon payment, the APR, and other terms of repayment. Instead, as alleged, the credit ads placed this critical cost information in unreadable fine print disclosures.

Under all three final orders, the companies may not, inter alia, misrepresent in any motor vehicle lease advertisement the total amount due at lease signing or delivery, the amount down, and/or the down payment, the capitalized cost reduction, or any other amount that reduces the capitalized cost of the vehicle (or that no such amount is required). Also, any ad that highlights an amount "down" or mentions certain other amounts due at lease inception (or states that there is no such charge) would have to provide an equally prominent statement of the total amount due at lease

inception. The final order with Grey also, among other things, prohibits the company in any closed-end credit advertisement involving motor vehicles from misrepresenting the existence and amount of any balloon payment or the annual percentage rate.

In Toyota Motor Sales, U.S.A., Inc. ("Toyota"),[10/] Volkswagen of America, Inc. ("Volkswagen),[11/] Suntrup Ford., Inc. and Suntrup Buick-Pontiac-GMC Truck, Inc. ("Suntrup"),[12/] Lou Fusz Automotive Network, Inc. ("Lou Fusz"),[13/] Beuckman Ford, Inc. ("Beuckman"),[14/] and Frank Bommarito Oldsmobile, Inc. ("Bommarito"),[15/] the

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[10/] FTC Docket No. C-3776 (Jan. 5, 1998).

[11/] FTC Docket No. C-3778 (Jan. 5, 1998).

[12/] FTC Docket No. C-3779 (Jan. 5, 1998). As indicated above, the final decision and order covered two related companies: Suntrup Ford, Inc. and Suntrup Buick-Pontiac-GMC- Truck, Inc. A separate consent agreement was signed by each company, however. See Suntrup Ford, Inc., FTC File No. 952 3200 (Oct. 7, 1997), and Suntrup Buick-Pontiac-GMC Truck, Inc., FTC File No. 952 3201 (Oct. 7, 1997).

[13/] FTC Docket No. C-3780 (Jan. 5, 1998).

[14/] FTC Docket No. C-3777 (Jan. 5, 1998).

[15/] FTC Docket No. C-3774 (Jan. 5, 1998).

Commission issued final decisions and orders with two major automobile manufacturers and five St. Louis, Missouri-area dealerships and their Chief Executive Officers ("CEOs") pertaining to deceptive lease and/or credit advertisements. As reported on last year when the orders were accepted for public comment, these orders settled charges that the seven companies violated the CLA and Regulation M and/or the TILA and Regulation Z and the FTC Act by misrepresenting, hiding, or failing to adequately disclose the cost and terms of automobile lease and/or credit transactions. The orders in Toyota and Volkswagen prohibit misrepresentations of the total amount due at lease signing and require lease ads that state any charge that is part of the amount due at lease signing or that no such charge is required (excluding a statement of the periodic payment) to state with equal prominence the total amount due at lease signing. These manufacturers are also required to comply with all requirements of the CLA and Regulation M in lease ads. The orders in the St. Louis cases prohibit the dealerships and their CEOs from misrepresenting the costs of leasing, including the total amount due at lease signing. The orders also require compliance with all aspects of the CLA and Regulation M, including that mandatory triggered terms in advertisements be stated clearly and conspicuously. Also, the Lou Fusz order prohibits misrepresentations of the type of transaction advertised, including that the offer is for a one- payment lease. It enjoins Lou Fusz from advertising that a specific offer is available, unless the company usually and customarily offers to lease vehicles at the advertised terms. The Beuckman order would also prevent the company from stating the term "RCL" without stating clearly and conspicuously that this term refers to a lease. The Bommarito order also prohibits misrepresentations of the terms of financing a vehicle, including the amount of any balloon payment. In addition,

Bommarito is required to include the amount of any final balloon payment prominently, and in close proximity, to certain advertised credit terms. The orders with the St. Louis dealerships also prohibit violations of the TILA and Regulation Z.

The Commission continues to view consumer and business education efforts as important to its enforcement activities. In 1998, in view of increasing issues concerning possible home equity fraud, the Commission issued three consumer publications to provide additional information to consumers considering home equity loans and reverse mortgages: "Home Equity Loans: The Three-Day Cancellation Rule;" "Reverse Mortgages -- Cashing in on Home Ownership;" and "Home Equity Scams: Borrowers Beware."[16/] The Commission also issued a news release, "Northwest, Air Canada Airlines Customers with Canceled Tickets May Have Rights under Federal Credit Law," to assist consumers in using their rights under the Fair Credit Billing Act, an amendment to the TILA. The Commission staff also continued to participate in the Board-sponsored "Leasing Education Program Team," involving the Board, Commission staff, and a coalition of entities (including consumer groups, state attorneys general and industry representatives) now developing online and other forms of lease materials to enhance awareness and understanding of

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[16/] " These publications were also designed to assist consumers in Texas, where the state constitution was amended to allow companies to offer general home equity loans, starting in 1998, for the first time in that state's history. See, e.g., "FTC Release: FTC Education Effort Focuses on Home Equity Loan Fraud" (May 20, 1998).

leasing. All of the above consumer protection and business education materials were also made available to the public through the Commission's Website at "www.ftc.gov. "[17/]

## Equal Credit Opportunity Act

In 1998, the Commission filed a complaint in federal district court charging a Washington, D.C. area mortgage lender with, inter alia, violations of the Equal Credit Opportunity Act ("ECOA") and Regulation B and the FTC Act. This case is discussed below. Other enforcement efforts continue.

In January 1998, the Commission filed a complaint in United States District Court for the District of Columbia in Capital City Mortgage,[18/] alleging that this company and its owner, Thomas K. Nash, violated the ECOA and Regulation B and engaged in unfair or deceptive acts or practices in violation of the FTC Act, in numerous manners. These alleged ECOA violations included: 1) failing to take written applications for mortgage loans; 2) failing to collect required information about the race or national origin, sex, marital status, and age of applicants; 3) failing to provide applicants with written notice of adverse action; and 4) providing notice of adverse action, but failing to provide applicants with: a) the correct principal reason for the action taken or b) the correct name and address of the Federal Trade Commission, the

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[17/] " Information regarding the Commission's enforcement actions and other activities discussed in this report are also available at this Website.

[18/] See supra note 1.

federal agency that administers compliance with the ECOA with respect to Capital City and Nash. As indicated above, this case is now in the discovery phase, and it has been joined for discovery purposes with a private lawsuit.[19/] The Commission is seeking civil penalties and injunctive relief for the alleged violations of the ECOA and Regulation B and the FTC Act.

In May 1998, the Commission and other federal agencies submitted a joint comment to the Board about Regulation B.[20/] The comment was submitted in response to the Board's request for comment and advance notice of proposed rulemaking. In their comment, the agencies urged the Board to amend Regulation B to permit lenders voluntarily to collect information about the race and gender of applicants for non-mortgage credit. According to the comments, the current prohibition of collecting such information "needlessly inhibits the ability of financial service providers to learn about and respond to market opportunities to better serve underserved communities. The prohibition makes it difficult for institutions to know whether products intended to expand access to credit, including to minorities, reach their intended customer base."

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[19/] See supra note 3.

[20/] Letter from Commission, Department of Treasury, Department of Justice, Department of Housing and Urban Development, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Small Business Administration to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System dated May 28, 1998.

The comments also urged the Board to clarify that creditors may not discriminate on a prohibited basis in their preapplication marketing practices.[21/]

The Commission continued its consumer and business education efforts in this area. In September 1998, Commissioner Thompson and Consumer Protection Bureau Director Bernstein participated in credit-related seminars as part of the Congressional Black Caucus Foundation's Legislative Weekend.[22/] Among other things, at this conference, a new FTC credit publication was released. The publication, "Bound for Good Credit," combines in one source for consumers many of the agency's most popular credit brochures (including information about the ECOA).

The Commission staff also worked with other governmental agencies and with creditor and consumer organizations to increase awareness of and compliance with the ECOA. The Commission staff also continued to participate actively in the Interagency Task Force on Fair Lending.

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[21/] The Commission voted 3-1 to file this comment with the Board, with Commissioner Azcuenaga not participating and Commissioner Swindle dissenting and issuing a statement concurring in part and dissenting in part.

[22/] See "FTC Release: FTC Officials Discuss Consumer Credit Issues and Highlight Consumer Education Efforts" (Sept. 18, 1998).

## Electronic Fund Transfer Act

In March 1998, in the America Online, Inc. ("AOL"),[23] CompuServe, Inc. ("CompuServe"),[24] and Prodigy Services Corporation ("Prodigy"),[25] the Commission issued final decisions and orders in three cases alleging violations of the FTC Act and the Electronic Fund Transfer Act ("EFTA") and Regulation E. These cases resolved Commission charges that the companies' "free trial" offers resulted in unexpected charges for many consumers. As reported on last year when the orders were accepted for public comment, the complaints alleged that these Internet service providers failed to make clear that consumers had an affirmative obligation to cancel before the trial period ended. As a result, consumers who failed to cancel were automatically enrolled as members and began incurring monthly charges. The settlements, inter alia, prohibit AOL, CompuServe and Prodigy from: misrepresenting the terms or conditions of any online service trial offer; and representing that an online service is free or otherwise representing that consumers need not pay for the online service, unless they disclose clearly and prominently in their instructional materials any obligation to cancel or take other action to avoid charges, and in all other advertisements include a statement directing consumers to where this disclosure is available. The

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[23] FTC Docket No. C-3787 (Mar. 24, 1998).

[24] FTC Docket No. C-3789 (Mar. 24, 1998).

[25] FTC Docket No. C-3788 (Mar. 24, 1998).

AOL settlement also requires the company to disclose the manner in which fees or charges are assessed or calculated and bars misrepresentations about the terms or conditions of any electronic fund transfer from a consumer account.

## II. AN ASSESSMENT OF THE EXTENT TO WHICH COMPLIANCE IS BEING ACHIEVED BY CREDITORS SUBJECT TO THE COMMISSION'S ENFORCEMENT AUTHORITY[26/]

### Truth in Lending Act and Consumer Leasing Act

This year, the Commission received various inquiries regarding home equity lending, including, for example, those concerning credit insurance and loan "flipping." Many mortgage brokers requested information about the disclosure requirements of Regulation Z, including copies of the regulation and the Board's Official Staff Commentary. Many businesses continued to request information about the lease advertising requirements of Regulation M, including copies of the Commission's brochure, "Advertising Consumer Leases." Some consumers requested information about lease transactions, including copies of the FRB-FTC Lease

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[26/] Among other things, the Commission is charged with enforcement of the FTC Act and various federal consumer credit laws and regulations, including the TILA, ECOA and EFTA, with respect to most nonbank entities in the nation. It does not have data regarding the extent of compliance by these numerous entities with these requirements. In lieu thereof, the Commission is providing information regarding certain issues raised by consumers and/or business entities pertaining to these mandates.

Education Program Team's "Keys to Vehicle Leasing."

Equal Credit Opportunity Act

The Commission received some inquiries about fair lending matters. The Commission continued to receive requests for information about ECOA requirements from mortgage lenders and mortgage brokers.

Electronic Fund Transfer Act

The Commission received some inquiries from consumers regarding EFTA protections for point-of-sale debit transactions, including those regarding unauthorized transactions and error resolution procedures. The Commission receives a small number of inquiries about these rules in comparison to those under the credit and lease requirements.

## III. ANY SUGGESTIONS FOR CHANGES IN THE ACTS OR THEIR IMPLEMENTING REGULATIONS

The Commission supports the Board's regulatory review, now under way, of Regulation B. The Commission also understands that the Board expects to undertake a review of Regulation Z, after conclusion of its Regulation B review. Because Regulation Z affects many diverse types of transactions and issues, the Commission would support any such effort to update and clarify these requirements as well.

The Commission hopes that the information contained in this letter responds to your inquiry and will assist in preparation of the Board's Annual Report to

Congress. If any other information would be useful or if you request additional assistance, please contact David Medine, Associate Director, Division of Financial Practices, at (202) 326-3025.

By direction of the Commission.

Robert Pitofsky
Chairman

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 6, 2000

Dolores S. Smith, Director
Division of Consumer and Community Affairs
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

Dear Ms. Smith:

This letter responds to your request for information regarding the enforcement activities of the Federal Trade Commission ("Commission" or "FTC") under the Truth in Lending, Consumer Leasing, Equal Credit Opportunity, and Electronic Fund Transfer Acts ("Acts") during the past year for use in preparing the Federal Reserve Board's ("Board") Annual Report to Congress. You have asked for information regarding the Commission's enforcement activities pursuant to those Acts, including methods of enforcement and significant enforcement actions and the extent to which compliance is achieved by entities subject to the Commission's enforcement authority. Also, you have asked whether the Commission recommends any changes to these laws or their implementing regulations or wishes to provide any other comments or observations.

## I. A DESCRIPTION OF THE COMMISSION'S ENFORCEMENT ACTIVITIES UNDER THE ACTS DURING THE PAST YEAR

### *Truth in Lending Act and Consumer Leasing Act*

Since January 1999 up to the present, the Commission obtained consent judgments against seven subprime mortgage lenders and their owners for alleged violations of the Home Ownership and Equity Protection Act ("HOEPA"),(1) the Truth in Lending Act ("TILA"), Regulation Z, and/or the Federal Trade Commission Act ("FTC Act"). The Commission also issued a final decision and order against a nationwide mortgage company (and its successor entities) in connection with the company's alleged deceptive cost information and deceptive practices, in violation of the TILA and Regulation Z and the FTC Act. Litigation is also continuing in federal district court regarding a complaint charging a Washington, D.C. mortgage lender and its owner, inter alia, with violating the Truth in Lending Act ("TILA") and Regulation Z and the FTC Act, in connection with alleged deceptive and unfair practices in home mortgage lending. The Commission also issued one consent decree against a vehicle manufacturer, and one consent decree against two related vehicle dealerships and their owner, providing for civil penalties and other relief for alleged lease and/or credit advertising violations of defendants' prior FTC orders settling charges that the entities failed to disclose and/or failed to disclose clearly and conspicuously required lease and/or credit advertising cost information, in violation of the Consumer Leasing Act ("CLA") and Regulation M and/or the TILA and Regulation Z and the FTC Act. The Commission also issued two final decisions and orders, and accepted for public comment consent agreements in five other cases, involving

lease and/or credit advertising. These cases alleged deceptive lease and/or credit advertising claims in violation of the FTC Act and failure to disclose and/or failure to disclose clearly and conspicuously important lease and/or credit cost terms, in violation of the CLA and Regulation M and/or the TILA and Regulation Z, in computer leases or vehicle leases. These cases are discussed below. Other investigations of potential TILA and/or CLA violations are ongoing.

A. Mortgage Cases Alleging HOEPA Violations

In 1999, consent judgments were entered in seven cases against subprime mortgage lenders around the country for alleged violations of the HOEPA, TILA and Regulation Z, and the FTC Act:(2) Federal Trade Commission v. Cooper ("Cooper"),(3) Federal Trade Commission v. Capitol Mortgage Corp. ("Capitol Mortgage"),(4) *Federal Trade Commission v. CLS Financial Services, Inc.* ("CLS Financial"),(5) *Federal Trade Commission v. Granite Mortgage, LLC* ("Granite Mortgage"),(6) *Federal Trade Commission v. Interstate Resource Corp.* ("Interstate"),(7) *Federal Trade Commission v. LAP Financial Servs., Inc.* ("LAP Financial"),(8) and *Federal Trade Commission v. Wasatch Credit Corp.* ("Wasatch Credit").(9) These cases were part of the Commission's "Operation Home Inequity," a law enforcement and consumer education campaign seeking to enforce HOEPA and curb abusive practices in subprime mortgage lending. All seven cases involve injunctive relief under HOEPA, the TILA, Regulation Z, and the FTC Act. In six cases, the defendants agreed to pay consumer redress totaling $572,500; in two cases, the companies must obtain performance bonds before they offer or extend specified credit in the future; and, in one case, defendants are banned from any future involvement with high-cost loans

secured by consumers' homes.

In *Cooper*, the complaint alleged that Barry Cooper dba Barry Cooper Properties violated HOEPA, Regulation Z, and the FTC Act by including a prohibited prepayment penalty in its mortgage loans and by engaging in asset-based lending practices. As part of the settlement, Cooper agreed to pay $25,000 in consumer redress. The consent judgment, *inter alia*, also prohibits Cooper from offering or making any HOEPA loan for five years, unless he first obtains a $150,000 performance bond, and requires Cooper to reform consumers' contracts by nullifying the prohibited provisions.

In *Capitol Mortgage*, the complaint alleged that the company and its principal violated HOEPA Regulation Z, and/or the FTC Act by failing to give consumers the required HOEPA notice and disclosure of terms and by improperly depriving consumers of the three-day waiting period created by HOEPA. The complaint also alleged that defendants included prohibited balloon payments, increased interest rate provisions, and prepayment penalties in loan documents. The complaint further alleged that the company violated TILA and Regulation Z, *inter alia,* by failing to make required disclosures and by engaging in practices that deprived consumers of the three-day right to rescind the loan. The consent judgment, *inter alia*, bars defendants from participating in any activity related to certain high-cost loans secured by consumers' principal dwellings and requires defendants to reform existing contracts to nullify prohibited provisions.

In *CLS Financial*, the complaint charged the company and its main principal with violating HOEPA, Regulation Z, and/or the FTC Act by failing to provide required HOEPA notices

and disclosures and by using prohibited balloon payment and interest rate increase provisions. The complaint also charged that the company made loans involving asset-based lending in violation of HOEPA and that defendants allegedly falsely labeled loans as "open-end" credit in an attempt to evade HOEPA, in violation of the FTC Act. The consent judgment, *inter alia*, requires defendants to pay $60,000 in consumer redress and to reform open loans to nullify prohibited provisions.

In *Granite Mortgage*, the complaint alleged that the company, two other entities, and two principals violated HOEPA, Regulation Z, and/or the FTC Act by failing to provide required HOEPA notices and disclosures. The complaint also alleged that defendants violated HOEPA,
Regulation Z, and/or the FTC Act by using prohibited prepayment penalty provisions and engaging in asset-based lending. The complaint also charged the company and other entities with failing to provide required TILA disclosures. The consent judgment, *inter alia*, requires defendants to pay $132,500 in consumer redress and to reform open loans to nullify prohibited provisions.

In *Interstate*, the complaint alleged that the company and two principals violated HOEPA, Regulation Z, and/or the FTC Act by failing to provide material credit information as required by HOEPA. Under the consent judgment, defendants are required, inter alia, to pay $50,000 in consumer redress.

In *LAP Financial*, the complaint charged the company and its principal with numerous violations of HOEPA, Regulation Z, and/or the FTC Act, including failure to provide required HOEPA notices and disclosures; asset-based lending; using

prohibited prepayment penalties; and making direct payments to home improvement contractors. The complaint also alleged that the company violated TILA and Regulation Z by failing to provide required disclosures and engaging in rescission-related violations. The consent judgment, inter alia, requires defendants to pay $250,000 in consumer redress and to reform loans by nullifying prohibited provisions.

In *Wasatch Credit*, the complaint charged Wasatch Credit, related entities, and two principals with violating HOEPA, Regulation Z, and/or the FTC Act by failing to provide HOEPA notices and disclosures and/or by improperly depriving consumers of the three-day HOEPA waiting period. The complaint also alleged that defendants used prohibited balloon payment and increased interest rate provisions and engaged in asset-based lending, in violation of HOEPA, Regulation Z, and/or the FTC Act. It further alleged that defendants violated TILA, Regulation Z, and/or the FTC Act by failing to provide required disclosures and engaging in practices that deprived consumers of their right to rescind the loan. It also alleged that, in violation of the FTC Act, defendants directed borrowers to falsely characterize consumer loans as business loans (in an apparent attempt to evade HOEPA and the TILA) and that one entity falsely represented to consumers that the credit offered and extended was open-end when, in fact, it was closed-end. Under the consent judgment, defendants are required, inter alia, to pay $55,000 in consumer redress and to reform existing contracts to nullify prohibited provisions. Defendants are also prohibited from offering or extending consumer credit, unless they first obtain a $250,000 performance bond that would remain in effect for five years.

## B. *Other Mortgage Cases*

In *Fleet Finance, Inc. and Home Equity U.S.A., Inc.* ("Fleet Finance"),(10) the Commission issued a final decision and order settling charges that Fleet Finance violated the TILA and Regulation Z, and engaged in deceptive practices in violation of the FTC Act, by failing to provide accurate, timely disclosures of the costs and terms of home equity loans (and other consumer credit transactions) to consumers and by failing to provide or accurately provide consumers with information about their home equity rescission rights. More specifically, the complaint charged that Fleet Finance extended consumer credit transactions or purchased consumer credit transactions, in which Fleet Finance acquired or retained a security interest in the consumers' principal dwellings, and failed to provide the consumers with the right to rescind the credit transactions by, inter alia: 1) failing to provide consumers with notices of the right to rescind; and 2) waiving consumers' right to rescind, and disbursing funds, pursuant to oral and other insufficient waivers. The complaint also alleged that Fleet Finance in extending consumer credit transactions: 1) failed to provide consumers with all TILA-required disclosures of the costs and terms of credit and/or provide these disclosures prior to consummation of credit transactions; 2) failed to provide or accurately provide certain TILA disclosures, including the annual percentage rate. The complaint also alleged that Fleet Finance purchased consumer credit transactions that failed to provide or accurately provide required TILA disclosures. The complaint also alleged that Fleet Finance failed to retain, inter alia, TILA disclosures and rescission notices for two years, in violation of Regulation Z.

The order requires Fleet Finance and its successor companies,

Home Equity U.S.A. (incorporated in Rhode Island and Delaware), to pay $1.3 million for consumer redress and administrative costs. The redress program applies to certain consumers whose mortgage loans were originated or purchased by Fleet Finance or a predecessor company (also named "Fleet Finance") between January 1, 1990 and December 31, 1993. The program covers certain consumers whose mortgage loans, inter alia, were paid off to or written off by Fleet Finance, the predecessor, or Fleet Financial Group, Inc., a parent corporation. The program also covers certain consumers who contact an 800-number set up under the proposed order and provide information showing they are eligible for consumer redress under the terms of the order. The order also prohibits Fleet Finance and its successor companies, inter alia, from future violations of the TILA and Regulation Z and from various misrepresentations of credit costs and terms.

In *Federal Trade Commission v. Capital City Mortgage Corp.* ("Capital City Mortgage"),(11) litigation continued against a Washington, D.C. area mortgage company and its owner in this case alleging numerous violations of federal laws, inter alia, the TILA and Regulation Z and the FTC Act.(12) The complaint alleges, inter alia, that defendants violated the TILA and Regulation, and engaged in unfair or deceptive acts or practices in violation of the FTC Act, by, inter alia: 1) understating the annual percentage rate and finance charge; 2) failing to disclose or accurately disclose the payment schedule (including failing to disclose a balloon payment); and 3) failing to provide disclosures that accurately reflect the legal obligation. The complaint also alleges that defendants engaged in other deceptive or unfair practices in offering and extending credit and throughout the loans, in violation of the FTC Act, with the result that a number of borrowers were

overcharged on their loans, were defaulted, and had title to their homes or other property impaired or completely lost (along with the equity). The complaint asks the court to award, inter alia, the amount necessary to prevent unjust enrichment and consumer redress (including refunds of monies paid, disgorgement of ill-gotten gains, and rescission of contracts) and to permanently restrain defendants from future law violations. The discovery phase in the case ended on December 20, 1999; a trial date has not yet been set.(13)

### C. *Lease and Credit Advertising Cases*

In *United States v. Mazda Motor of America, Inc.* ("Mazda"),(14) a consent decree was entered against a vehicle manufacturer settling charges that it violated a 1997 FTC order ("FTC order")(15) and various state orders in connection with its televised lease advertisements. Under the FTC order, Mazda was required, inter alia, to disclose important lease terms in advertisements clearly and conspicuously and as required by the CLA and Regulation M. According to the complaint, following issuance of the FTC order, Mazda ran important lease terms in televised advertisements in small and unreadable print, offset by distracting images or sounds, or that appeared on the screen for too short a time. Under the consent decree, Mazda is required to pay $5.25 million -- the largest civil penalty ever in a FTC consumer protection matter: $4.05 million in civil penalties for alleged violations of the FTC order and $1.2 million in fines and costs to 24 states as part of the settlement. Mazda is also required to provide its dealers with consumer education brochures on vehicle leasing for distribution to consumers for one year and to distribute, inter alia, copies of lease and credit regulations to its dealers. Under the consent decree, Mazda is also prohibited from

violating the CLA and Regulation M.

In *United States v. Suntrup Buick-Pontiac-GMC Truck, Inc.*, Suntrup Ford, and Thomas Suntrup ("Suntrup"), (16) a consent decree was entered against two St. Louis vehicle dealerships and their chief executive officer ("CEO") settling charges that defendants violated a 1998 FTC order ("FTC order")(17) in connection with their lease and credit advertisements. Under the FTC order, Suntrup was required to disclose important financial information in lease and credit advertisements "clearly and conspicuously" and as required by the CLA and Regulation M and the TILA and Regulation Z. According to the complaint, following issuance of the FTC order, Suntrup's vehicle leasing advertisements stated the amount of any payment or that any or no initial payment was required at lease inception but failed to disclose clearly and conspicuously required financial information, including the total amount due prior to lease inception, by, inter alia, using small type, short durations or distracting sounds or images, and also omitted certain required lease terms. In addition, the complaint alleged that Suntrup's vehicle credit advertisements offered just "$1 down" without disclosing required credit terms. Under the consent decree, Suntrup is required to pay a $40,000 civil penalty - the first ever collected by the Commission for such an order violation by a vehicle dealership or its CEO. Suntrup is also required for two years to make the brochure, "Keys to Vehicle Leasing,"(18) available to consumers who visit the dealerships.

In *Dell Computer Corp. ("Dell")*(19) and Micron *Electronics, Inc. ("Micron")*,(20) the Commission issued final decisions and orders against two computer leasing companies resolving charges that they violated the CLA and Regulation M and the FTC Act, by disseminating misleading advertisements for

consumer leases primarily in Internet promotions. The complaints in these cases charged, inter alia, that the companies disseminated deceptive lease advertisements that offered low monthly payment amounts and placed material cost information in unreadable fine print or an inconspicuous location or omitted such information altogether -- including, inter alia, that the monthly payments are components of lease offers, whether or not a security deposit is required, and/or the number and timing of scheduled payments. Under the orders in these cases, respondents must, inter alia, provide all the disclosures required by the CLA and Regulation M for lease advertisements "clearly and conspicuously," that is, in a clear, readable (or audible), and understandable manner. The orders also prohibit the companies from running advertisements that highlight low monthly payments, unless the promotions also state, inter alia, clearly and conspicuously, that: 1) the transaction is a lease; 2) the total amount due at lease signing; 3) whether or not a security deposit is required; and 4) the number, amount, and timing of scheduled payments. The orders also prohibit the companies from making any reference to a charge that is part of the total amount due at lease signing or that no such amount is due, unless the promotion also states with equal prominence the total amount due at lease inception. In addition, the orders require respondents to comply with all requirements of the CLA and Regulation M.

The Commission also issued for public comment consent agreements with six Philadelphia, Pennsylvania-area vehicle dealerships and their CEOs for violations of the CLA and/or TILA and FTC Act pertaining to deceptive lease and/or credit advertisements:(21) Northeast Auto Outlet, Inc. ("Northeast"),(22) Norristown Automobile Co. ("Norristown"),(23) Dunphy Nissan, Inc. ("Dunphy"),(24)

Marty Sussman Organization, Inc. ("Marty Sussman"),(25) Pacifico Ford, Inc. ("Pacifico Ford"),(26) and Pacifico Ardmore, Inc. ("Pacifico Ardmore").(27) These cases involve actions for omitting or burying in fine print key cost information in advertised lease and/or credit deals.

In all six cases, the complaints alleged deceptive vehicle lease advertisements, in violation of the FTC Act, either by failing to disclose and/or failing to disclose adequately essential lease information. The six dealerships and their CEOs were charged with hiding many costs associated with the lease in fine-print disclosures located far from the more prominent claims of low monthly payments or with omitting these costs. The complaints also alleged, inter alia: 1) that Dunphy misrepresented the amount due at lease inception by promoting low down payments or "$0 down," when additional fees were due at lease signing; 2) that Dunphy and Northeast represented that consumers could buy the advertised vehicle for a low monthly charge, while the offer was for a lease; 3) that Northeast misrepresented that the dealer's "double your down payment"offer was available for the advertised vehicles when it was not. In all six cases, the complaints also alleged that the lease advertisements used triggering terms under the CLA and Regulation M, but failed to disclose or failed to disclose clearly and conspicuously other required information, such as the total amount due at leasing signing, and that the promotions stated a down payment amount more prominently than the disclosure of the total amount due at lease signing.

In addition, the complaints charged that Dunphy, Norristown, Northeast and Pacifico Ardmore ran deceptive credit promotions in violation of the FTC Act, by failing to disclose and/or failing to disclose adequately critical credit terms, by

omitting required terms or placing this information in fine-print disclosures located far from the more prominent low down payment claims. The complaints against these four dealers also alleged that the credit advertisements used triggering under the TILA and Regulation Z, yet omitted or failed to disclose clearly and conspicuously required information. All six complaints also allege that the dealers' credit advertisements stated a rate of finance charge without stating that rate as an "APR," in violation of the TILA and Regulation Z.

The consent agreements in these six cases would require these dealerships and their CEOs, inter alia, to make clear and accurate cost disclosures in their lease and/or credit advertisements. In all six cases, the proposed orders would prohibit these entities from placing advertisements that state the amount of any payment due at lease inception (excluding the monthly payment) or the fact that any or no inception payment is due, without also disclosing with "equal prominence" the total amount due at lease inception. The proposed orders would also prohibit respondents from disseminating lease promotions that state the amount of any payment, or that any or no initial payment is required at lease inception, unless the advertisements also clearly and conspicuously disclose other required lease information, such as the total amount due at lease inception and whether or not the consumer must pay a security deposit. All respondents would also be required to comply with all provisions of the CLA and Regulation M. In addition: 1) Dunphy would be prohibited from misrepresenting the costs of leasing, including the amount due at lease inception; 2) Dunphy and Northeast would be prohibited from representing that the advertised terms apply to a cash or credit offer when, in fact, they apply only to lease a particular vehicle; and 3) Northeast

would be prohibited from misrepresenting the availability of any advertised offer. All respondents would also be required to comply with all provisions of the TILA and Regulation Z.

**D. *Consumer and Business Education***

The Commission continues to view consumer and business education efforts as important to its enforcement activities. In 1999, in connection with continuing concerns about possible home equity fraud, the Commission issued a consumer publication to provide information to consumers considering home equity loans, "Need a Loan? Think Twice About Using Your Home as Collateral." In addition, the federal Interagency Task Force on Fair Lending, of which the Commission is a member, issued a consumer brochure to facilitate shopping and negotiating for a home mortgage, "Looking for the Best Mortgage: Shop, Compare, Negotiate."(28) The Commission staff also continued to participate in the Board-sponsored "Lease Education Program Team," involving the Board, Commission staff, and a coalition of entities (including consumer groups, state attorneys general and industry representatives), which developed various online educational materials and a computer program to enhance awareness and understanding of leasing. The Commission's above consumer protection materials were also made available to the public through the Commission's website at "www.ftc.gov."(29)

**Equal Credit Opportunity Act**

In 1999, the Commission obtained consent decrees against two vehicle finance companies for violations of the Equal Credit Opportunity Act ("ECOA") and its implementing Regulation B. Litigation continues in a case involving a

subprime mortgage lender. Those three cases are discussed below. Other enforcement efforts continue.

In *United States v. Franklin Acceptance Corporation* ("Franklin"),(30) a consent decree was entered settling allegations that a vehicle finance company discriminated against applicants on the basis of sex, marital status and the fact that an applicant's income derived from public assistance sources, and when taking adverse action on an application, failed to provide notice as required under the ECOA and the Fair Credit Reporting Act ("FCRA"). The complaint alleged that Franklin discriminated against applicants on the basis of sex and marital status by discounting or excluding from consideration the income of an applicant who received payments of child support. The complaint alleged that Franklin discriminated against applicants on the basis of marital status by failing to aggregate the incomes of unmarried co-applicants while aggregating the income of married co-applicants. The complaint alleged that Franklin discriminated against applicants who derived their income from public assistance by discounting or refusing to consider such income. In addition, the complaint alleged that, when taking adverse action on an application, Franklin failed to provide the applicant with written notification of the action taken, failed to disclose the specific reasons for the action taken or to disclose the applicant's right to request such reasons, and, when adverse action was based on a report from a consumer reporting agency, failed to provide notice as required under the FCRA. Under the consent decree, defendants agreed to pay a civil penalty of $800,000 and to the entry of a permanent injunction.

In *United States v. Ford Motor Credit Co.*,(31) a consent decree was entered resolving allegations that this vehicle

finance company discriminated in the pricing of its credit products against applicants on the basis of marital status. The complaint alleged that the company failed to aggregate the incomes of unmarried co-applicants while aggregating the income of married co-applicants with the result that unmarried co-applicants often paid more for credit. Under the consent decree, defendants agreed to pay $650,000 to a consumer redress program and to the entry of a permanent injunction.

Litigation continued in *Capital City Mortgage*,(32) alleging that the company and its owner violated the ECOA and Regulation B by: failing to take written applications for mortgage loans; failing to collect required information about the race or national origin, sex, marital status, and age of applicants; failed to provide rejected applicants with written notice of adverse action; and, when providing notice of adverse action, failed to provide applicants with the correct principal reason for the action taken or the correct name and address of the Commission, the federal agency that administers compliance with the ECOA with respect to defendants. The complaint seeks civil penalties and injunctive relief for the alleged violations of the ECOA and Regulation B.

In November 1999, the Commission and other federal agencies submitted a joint comment to the Board about Regulation B.(33) The comment was submitted in response to the Board's notice of proposed rulemaking with respect to Regulation B. In their comment, the agencies urged the Board to amend Regulation B to allow lenders voluntarily to collect information about the race and gender of applicants for non-mortgage credit. According to the comment, the current prohibition of collecting such information "inhibits the ability of financial service providers to learn about and respond to

market opportunities to provide credit to underserved communities. The prohibition makes it difficult for institutions to know whether products intended to expand access to credit, including to minorities, reach their intended customer base." The comment also urged the board to clarify that creditors may not discriminate on a prohibited basis in their preapplication marketing practices and to clarify how creditors may determine the need for special purpose credit programs.(34)

The Commission continued its consumer and business education efforts. The staff worked with other governmental agencies and with creditor and consumer organizations to increase awareness of and compliance with the ECOA. The Commission also continued its active participation in the Interagency Task Force on Fair Lending.

### Electronic Fund Transfer Act

In 1999, the Commission continued its consumer and business education efforts in this area. The Commission issued a brochure, "Guide to Online Payments," providing information to consumers about different types of online payment systems and security features.(35)

## II. AN ASSESSMENT OF THE EXTENT TO WHICH COMPLIANCE IS BEING ACHIEVED BY ENTITIES SUBJECT TO THE COMMISSION'S ENFORCEMENT AUTHORITY(36)

### Truth in Lending Act and Consumer Leasing Act

This year, the Commission received, inter alia, numerous inquiries concerning home equity lending, including concerning consumer rights under HOEPA. Many mortgage brokers, and some online mortgage entities, requested materials regarding the requirements of Regulation Z. Many credit and lease advertisers requested information regarding Regulations Z and M. Some consumers requested information regarding their TILA rights concerning unauthorized transactions and error resolution, including for online transactions.

### Equal Credit Opportunity Act

The Commission received various inquiries about fair lending and predatory lending issues. The Commission also received requests for information about ECOA from mortgage brokers.

### Electronic Fund Transfer Act

The Commission received some requests from consumers for information about EFTA protections pertaining to point-of-sale debit transactions, including for unauthorized use and error resolution. The Commission continues to receive a small number of inquiries about these requirements in comparison to those under the credit and lease area.

## III. ANY SUGGESTIONS FOR CHANGES IN THE ACTS OR THEIR IMPLEMENTING REGULATIONS

The Commission supports the Board's regulatory review of Regulation B. The Commission understands that the Board

may undertake a review of Regulation Z, following conclusion of its Regulation B review. In view of the diverse transactions and issues affected by Regulation Z, the Commission would also support any such effort in the future to update and clarify Regulation Z as well.

The Commission hopes that the information contained in this letter responds to your inquiry and will assist in preparation of the Board's Annual Report to Congress. If any other information would be useful or if you request additional assistance, please contact David Medine, Associate Director, Division of Financial Practices, at (202) 326-3025.

By direction of the Commission.

Robert Pitofsky Chairman

Endnotes:

1. In this report, HOEPA, which amends the TILA and is implemented by Regulation Z, is referenced separately. HOEPA provides special protections for consumers who obtain high-rate or high-fee loans secured by their principal dwellings by requiring creditors to provide certain material information at least three days before the loan is consummated, prohibiting the use of certain loan terms, and barring specified practices.

2. The Commission voted 4-0 to approve the settlements, with Commissioner Swindle concurring in part and dissenting in part.

3. No. CV 99-07782 WDK (C.D.Cal. Aug. 2, 1999).

4. No. 2-99-CV580G (D. Utah Aug. 23, 1999).

5. No. C99-1215 Z (W.D. Wash. Jul. 30, 1999).

6. No. 99-289 (E.D. Ky. Aug. 12, 1999).

7. No. 99 Civ. 5988 (S.D. N.Y. Jul. 30, 1999).

8. No. 3:99 CV-496-H (W.D. Ky. Aug. 5, 1999).

9. No. 2-99CV579G (D. Utah Aug. 23, 1999).

10. FTC Docket No. C-3899 (Oct. 5, 1999).

11. No. 98CV00237 (D.D.C. filed Jan. 29, 1998).

12. The complaint in this matter also alleges, inter alia,

violations of the Equal Credit Opportunity Act. See infra p.11.

13. The case is joined, for purposes of discovery, with a private lawsuit, Hargraves v. Capital City Mortgage Corp., No. 98CV1021 (D.D.C. filed Apr. 24, 1998).

14. No. SACV-99-1213 AHS (C.D. Cal. Oct. 7, 1999).

15. FTC Docket No. C-3714 (Feb. 6, 1997).

16. No. 4:99CV01746CEJ (E.D. Mo. Nov. 22, 1999).

17. FTC Docket No. C-3779 (Jan. 5, 1998).

18. This brochure was previously jointly developed by the FTC staff, Federal Reserve Board staff, and various industry representatives and consumer groups and explains, in simple terms, vehicle leasing transactions and costs.

19. FTC Docket No. C-3888 (July 28, 1999).

20. FTC Docket No. C-3887 (July 28, 1999).

21. The consent agreements were placed on the public record for public comment for sixty days, after which the Commission will decide whether to make them final. See 64 Fed. Reg. 68687 (Dec. 8, 1999).

22. FTC File No. 992 3080 (Dec. 2, 1999).

23. FTC File No. 992 3081 (Dec. 2, 1999).

24. FTC File No. 992 3082 (Dec. 2, 1999).

25. FTC File No. 992 3078 (Dec. 2, 1999).

26. FTC File No. 992 3079 (Dec. 2, 1999).

27. FTC File No. 992 3116 (Dec. 2, 1999).

28. The members of the Interagency Task Force include the: Department of Housing and Urban Development, Department of Justice, Department of the Treasury, Federal Deposit Insurance Corporation, Federal Housing Finance Board, Federal Reserve Board, Federal Trade Commission, National Credit Union Administration, Office of Federal Housing Enterprise Oversight, Office of the Comptroller of the Currency, and Office of Thrift Supervision.

29. Information concerning the Commission's enforcement actions and other activities discussed in this report are also available at this website.

30. No. 99-CV-2435 (E.D. Penn. May 14, 1999).

31. No. 99-75887 GEW (E.D. Mich. filed Dec. 9, 1999).

32. See supra note 11.

33. Letter from Commission, Department of Treasury, Department of Justice, Department of Housing and Urban Development, Office of the Comptroller of the Currency, Office of Thrift Supervision, Small Business Administration, and Office of Federal Housing Enterprise Oversight to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System dated November 15, 1999.

34. The Commission voted 3-1 to file this comment with the

Board, with Commissioner Swindle dissenting and issuing a separate statement.

35. This brochure was jointly developed by the Commission and America Online, Inc. ("AOL"). AOL was required to develop consumer education materials regarding online payment systems, pursuant to a final decision and order issued by the Commission (previously reported). See FTC Docket No. C-3787 (Mar. 24, 1998).

36. Among other things, the Commission is charged with enforcement of the FTC Act and various federal consumer financial laws and regulations, including the TILA, ECOA, and EFTA, with respect to most nonbank entities in the nation. It does not have data regarding the extent of compliance by these numerous entities with these requirements. In lieu thereof, the Commission is providing information regarding certain issues raised by consumers and/or business entities pertaining to these mandates.

# APPENDIX 2

| | |
|---|---|
| STATE OF SOUTH CAROLINA | ) |
| | ) IN ARBITRATION |
| COUNTY OF BARNWELL | ) |
| | ) |
| Daniel B. Lackey, George Buggs, Florine Buggs, Michael Highsmith, and Paula Johnson, | ) |
| | ) |
| Plaintiffs, | ) |
| | ) MEMORANDUM |
| v. | ) OF GREEN TREE |
| | ) FINANCIAL |
| Green Tree Financial Corporation. | ) CORPORATION |
| | ) |
| Defendant. | ) |
| | ) |

## INTRODUCTION

This memorandum is submitted on behalf of the Defendant Green Tree Financial Corporation (hereinafter Green Tree). The purpose of this memorandum is to address the single issue of whether an arbitration may proceed as a class action in the absence of specific language in the arbitration agreement permitting class treatment arbitration. Additional issues concerning class certification under Rule 23 and questions of the necessity for class treatment are reserved to be addressed at a later time if necessary.

Arbitration was compelled in this case pursuant to the Federal Arbitration Act (FAA) 9 USCA § 1 et. seq. Green Tree submits That federal law interpreting the FAA controls this issue and preempts stare law or regulation to the contrary. Green Tree submits further that the principle has been well established in the federal decisions dealing with or related to the issue that the parties may not be subjected to state class

action procedures in arbitration unless the arbitration agreement expressly permits class treatment in arbitration.

## STATEMENT OF FACTS

Green Tree is a financial services company doing business nationwide. From the complaint it appears that the Plaintiffs *Highsmith, Johnson* and Buggs are *all individuals* who financed the purchase of mobile homes. The Plaintiff Lackey financed home improvements. The consumer financing paper in each transaction was assigned to Green Tree. Each of the transactions involved a mortgage an real property in South Carolina. However, the Highsmith and Lackey transactions took place in Georgia. The other Transactions took place in South Carolina.

Each of the named Plaintiffs executed a Retail Installment Sales Contract which included an agreement to submit all claims to arbitration. While the wording of the agreements were not identical, they each required arbitration and none of the arbitration agreements permit class treatment in arbitration. Attached hereto for the arbitrators convenience are affidavits filed with the Court in connection with previous proceedings identifying the financing agreements.

Green Tree moved in the Circuit Court to stay the litigation and compel arbitration. The motion to compel arbitration was denied. On appeal The Circuit Court's order was reversed by the Court of Appeals. The case was remanded to the Circuit Court for further proceedings.

## SUMMARY OF ARGUMENT

1. The FAA supersedes state law and procedure and requires the enforcement of arbitration agreements according to their terms and no more, notwithstanding state law or procedure to the contrary.

2. State class action procedures may not be superimposed on an arbitration under the FAA unless the arbitration clause specifically provides for class action treatment.

## ARGUMENT

The FAA reflects a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem. Hosp. V. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The primary legislative purpose of the FAA is to assure the enforcement of arbitration agreements. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). While Congress recognized that enforcement of arbitration agreements would normally promote efficient and speedy dispute resolution, the cases are clear that promotion of efficiency is secondary to the enforcement of the terms of the arbitration agreement.

> We therefore are not persuaded by the argument that the conflict between two goals of the arbitration act - - enforcement of private agreements and encouragement of efficient and speedy dispute resolution must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern in passing the act was to enforce private

> agreements into which the parties had entered, and that concern requires that we vigorously enforce agreements to arbitrate even, if the result is 4, piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. ***

Id., p.221

There is no discretionary right in a trial court to refuse to enforce the arbitration agreement as written. Id. A court may not substitute its notions of fairness or judicial economy in place of the explicit terms of the agreement. As noted in Champ v. Siegel Trading Company, 55 F. 3d 269, 275 (7th Cir., 1995),

> The underlying motivation for the Federal Arbitration Act was to enforce the agreement of parties to arbitrate. Because the act was designed to overrule the historical refusal of the judiciary to enforce agreements to arbitrate, it follows that a court is not permitted to interfere with private arbitration agreements in order to impose its own view of speed and economy. This is the case even where the result would be the possibility of inefficient maintenance of separate proceedings.

See American Centennial Insurance Company v. National Casualty Company, 951 F.2d 107, 108 (6th Cir 1991). The South Carolina Supreme Court has recognized that the FAA preempts contrary state law. Soil Remediation Co. V. Nu-Wav Environmental, 317 S.C. 274, 476 S.E. 2d 149 (1996). Federal law therefore governs the enforcement of the FAA in both state and federal courts. Moses H. Cone Mem. Hosp., 460 U.S. at 24.

Section 4 of the FAA provides that when a court determines that an agreement to arbitrate exists, the court must order the parties to "proceed with the arbitration in accordance with the terms of the agreement." Parties to an arbitration agreement are entitled to have their agreement enforced "as they wrote it - and nothing more." Champ, 55 F.3d at 277. As noted in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990), Congress "surely did not intend that the parties be able to disregard selected contractual obligations willy-nilly in order to choose an arbitral foram more convenient or more suited to a party's particular needs."

Along these lines, the United States Supreme Court noted that arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." Volt Info. Sciences v. Bd. Of Trustees, 489 U.S. 468, 479 (1989). To hold otherwise would "fundamentally modify the terms of the parties' contract." Salvano v. Merrill Lynch, Pierce, Fenner & Smith. Inc., 85 N.Y. 2d 173, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (1995) (refusing to order expedited arbitration because arbitration agreement contained no such provision). From the forgoing it is apparent that in order to determine whether this case may proceed in arbitration as a class action, the Arbitrator must resort to federal law, and state law and procedure contrary to federal law interpreting the FAA has no application. Cohen v. Wedbush, Noble, Cooke, Inc., 941 F.2d 282, 285 (9th Cir. 1985)

The decisions applying federal law have determined without apparent exception that state class action procedures may not be imposed on an arbitration under the FAA unless *the*

arbitration agreement specifically provides for class treatment. Champ, supra; Gammaro v. Thorp Discount, 828 F. Supp. 673 (D. Minn. 1993); McCarthy v. Providential Corp, 1994 WL 387852,1994 U.S. Dist. LEXIS 10122 (N.D. Cal. 1994); Randolph v. Green Tree Financial Corp. 991 F.Supp. 1410 (N.D. Ala. 1997).

Similarly, courts have held that other procedural devices such as consolidation of cases under Federal Rule 42 must also yield to the express language contained in an arbitration agreement, and cannot be imposed unless specifically allowed. American Centennial, 951 F.2d 107, In American Centennial, the Sixth Circuit Court of Appeals dismissed a petition for consolidation of arbitration proceedings on the ground that the arbitration agreements did not provide for consolidation. See also Government of United Kingdom v. Boling Co., 998 F.2d 68 (2d Cir., 1993) (reversing an order granting a motion for consolidation); Protective Life Ins. Corp v. Lincoln National Life Ins. Corporation, 873 F.2d 281 (11th Cir. 1989). (holding that parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in. Id., p. 282.); McCarthy v. Providential Corporation, 1994 U.S. Dist. Lexis 10122 (D.C. Cal. 1994) (holding that class arbitration may not be ordered in the absence of a provision in an arbitration clause providing for arbitration on a class wide basis); see also Weverhaeuser Co. v. Western Seas, Shipping Co., 743 F.2d 635 (9th Cir. 1984), cert. denied, 469 U.S. 1061, 83 L. Ed, 2d 431, 105 S.Ct. 544 (1984) (parties may negotiate for and include provisions for consolidation of arbitration proceedings, but if they do not, court's cannot read such provisions into the agreement). Fundamentally, arbitration agreements must be enforced according to their specific terms and no others. Volt Info. Sciences v. Bd. of Trustees, 489 U.S. 468 (1989); Del E. Webb

Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987); Baesler v. Continental,Grain Co., 900 F.2d 1193 (8th Cir. 1990).

In *Champ*, the Seventh Circuit Court of Appeals rejected the argument That class arbitration is appropriate where the arbitration clause is silent on the issue- The Court stated that its "chief concern under the FAA is to enforce the parties arbitration (agreement) as they wrote it." To do otherwise would be to substitute the judgment of the court for the intent of the parries to the contract, contrary to the 46 overriding, goal' of the FAA to put arbitration agreements on equal footing with other contracts between private parries." 55 F.3d at 274, 275.

Cases allowing class arbitration under state law axe not applicable to enforcement of arbitration provisions under the FAA because of federal preemption over state law under the FAA. Episcopal Housing Corp, v. Federal Insurance Co., 269 S.C, 63 ) 1, 239 SE 2nd 647 (1977). Class action procedures may not be imposed on, an arbitration under
the FAA unless the arbitration provision specifically pen-nits class action treatment, and the arbitration provision in this case does not so provide.

The cases holding that class action procedures may *not* be superimposed on an arbitration clause enforceable under the FAA are based on fundamental principles of substantive contract law. Volt, 489 U.S. 468; Champ, 55 F. 3d 269. Class action rules are procedural devices permitting consolidation of matters properly before the court. Such procedural rules Should not be allowed to thwart the substantive contractual light of the parties to have individual disputes arbitrated, Nor can the procedural rules of class action be used as a method for the discovery of names and addresses of potential plaintiffs in

an effort to generate additional claims, "Class actions are provided only as a
means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means for the ends - to sacrifice the goal for the going." Vernon v. Drexel, Burnham & Co., 52 Cal. App. 3 rd 706 (1975); see also Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. I (1982) (holding that an arbitration agreement must be enforced as written even though arbitration would result in bifurcated proceedings).

For a court to substitute its notions of fairness of judicial economy in place of the explicit terms of the agreement would "deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." Champ, 55 F.3d at 275. Reading such terms into an agreement would "disrupt the negotiated risk/benefit allocation and direct [the parties] to proceed with a different sort of arbitration," Id.

## CONCLUSION

Under the FAA, the arbitration agreements involved in this case must be enforced according to their express terms, and no others. The arbitration agreements are silent on the issue of class treatment and no such procedure can therefore be imposed upon the proposition that class action parties. The overwhelming weight of authority stands for the treatment should not be permitted in this arbitration and that an order compelling class treatment is beyond the power of the arbitrator. Green Tree respectfully submits that the Plaintiffs' motion for class certification should be denied.

Herbert W. Hamilton
Daniel J. Ballou
KENNEDY COVINGTON LOBDELL
& HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731
(803) 329-7600
ATTORNEYS FOR GREEN TREE
FINANCIAL CORPORATION

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IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP. - ALABAMA
and GREEN TREE FINANCIAL CORPORATION,
*Petitioners,*

v.

LARKETTA RANDOLPH,
*Respondent.*

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

## BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

F. Paul Bland, Jr.
(Counsel of Record)
Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., NW, Ste. 800
Washington, D.C. 20036
(202) 797-8600

Jeffrey White
Association of Trial Lawyers of America
1050 31st Street, NW
Washington, D.C. 20007
(202) 965-3500

Attorneys for *Amici* Curiae

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## INTEREST OF THE *AMICI* CURIAE[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

TLPJ believes that arbitration, knowingly agreed to and fairly structured, can be a valuable mechanism for resolving appropriate legal disputes. In the past decade, however, an increasing number of corporations have attempted to cap their liability and limit their victims' rights by forcing their customers, employees, and vendors to participate in arbitration systems that are so unfair that most reasonable people simply will not pursue their claims. In response to these developments, three years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat such abuses. Through this project, our research has revealed that individuals are frequently deterred from taking part in arbitration by the growing and prohibitive costs charged in many arbitration systems. In some cases, our clients and others were directed to pay arbitration fees that actually exceeded the amount of money at issue in the disputes. We submit this brief to bring these facts to this Court's attention – and to review their implications for this Court's approach to arbitration.

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici* curiae made any monetary contribution to its preparation or submission.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 attorneys who represent employees in labor, employment and civil rights disputes. NELA is one of the largest organizations in the United States whose members counsel, and litigate on behalf of, employees regarding claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on precedent-setting employment law and civil rights issues. Recent cases before this Court and other courts include: *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); and *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998).

NELA members have represented, and continue to represent, tens of thousands of victims of employment discrimination, in federal and state courts. In a considerable number of these cases, employers have attempted to require these cases to be resolved through mandatory arbitration processes. The clients of NELA members will be significantly harmed, as will the public, if employers who violate the nation's civil rights laws are permitted to require–as a condition of employment–that employees submit to arbitration, especially when these arbitration proceedings require considerably more money to initiate and fully resolve than proceedings before federal and state courts.

The Association of Trial Lawyers of America ("ATLA") is a national voluntary bar association of approximately 50,000 attorneys practicing in every state. ATLA members primarily represent plaintiffs in personal injury, civil rights, consumer rights and employment discrimination cases. ATLA is concerned that arbitration is being abused, through prohibitive costs and other practices, to

effectively deprive many Americans of their Seventh Amendment right to a jury trial and the remedies to which they are entitled under the law.

## SUMMARY OF ARGUMENT

The Court of Appeals properly declined to compel arbitration in this case because the peculiar arbitration clause at issue here included no rules or other protection ensuring that consumer plaintiffs would not be required to pay prohibitive costs. Building upon a line of recent cases from other federal courts and a number of state courts, the Court of Appeals correctly reasoned that complete uncertainty on the central issue of the costs and fees of pursuing a claim made it likely that many consumers would be deterred from pursuing their statutory rights under the Truth in Lending Act ("TILA").

Defendant tries to portray the Court of Appeals as hostile to arbitration, because it concluded that many consumers would be reluctant to initiate arbitration in a system where they had no idea what they might be charged. It insists that arbitration is cheaper than litigation and that neither courts nor consumers should, therefore, be fearful of an arbitration provision that offers no protection against excessive costs. This argument has some surface appeal and might make sense if the Court of Appeals' ruling had taken place in a vacuum. In fact, however, there is substantial evidence in the public record that corporations are increasingly adopting arbitration provisions and procedures that require individuals to pay prohibitive costs and fees as a condition of pursuing their claims in arbitration. This brief will cite a wide variety of authorities illustrating that, again and again across the country, individuals raising claims against companies have been required to pay thousands (or in some cases, tens of thousands) of dollars to private arbitrators

for adjudication services that would have been available in the public courts for a nominal filing fee. And in far too many cases, the threat of such fees has been enough to deter individuals from pursuing their claims in arbitration. Viewed against this factual backdrop, the Court of Appeals' factual analysis was eminently reasonable. In a country where arbitration fees have frequently been prohibitive, and sometimes ruinous, many consumers would naturally be reluctant to "sign a blank check" and bring their claims in an arbitration proceeding which had no rules about or limitations on its cost.

Defendant's attack on the Court of Appeals' legal analysis is equally lacking in merit. Contrary to defendant's and its *amici*'s suggestion, this Court does not (and should not) always favor arbitration without qualification in all circumstances. There is nothing in this Court's jurisprudence that bars a lower court from refusing to enforce an arbitration clause that threatens individuals with the possibility of prohibitive costs. Instead, this Court has made clear that the lower courts should enforce arbitration clauses only when those clauses provide individuals with a forum where they have a meaningful opportunity to exercise their statutory rights. In more than a dozen recent cases, federal and state courts have applied this Court's teachings by refusing to enforce arbitration clauses that would deprive individuals of their statutory remedies. Lower courts have refused to enforce arbitration clauses that stripped individuals of statutory rights on their face, and they have refused to enforce arbitration clauses that by operation would deter persons from bringing statutory claims. The Court of Appeals' decision fits neatly in with these cases.

Defendant would like to see this Court put an end to this line of cases. It would like to see this Court end the current distinction between arbitration clauses that offer individuals a meaningful forum to pursue their claims (which are currently legal) and arbitration clauses that do not (which could not be enforced under the rationale of the Court of Appeals). This Court should reject that suggestion. It should make clear that arbitration clauses cannot legally operate as exculpatory clauses – and cannot be used to insulate corporations from the meaningful possibility that they might be held liable for breaching consumer protection statutes.

Defendant attempts to salvage its position by arguing that the threat of prohibitive costs would not deter consumers from pursuing arbitration because its arbitration clause suggests that prevailing consumer plaintiffs may recover their arbitral fees. We disagree with that reading, but, even if it is right, that does not matter. Since consumer plaintiffs who do not prevail will still be responsible for potentially large fees, the arbitration provision, at best, imposes a "Loser Pays Rule." Such a rule directly conflicts with established law and TILA.

Finally, defendant argues that consumers should not be allowed to appeal an order compelling arbitration unless they first completed arbitration. Where arbitration is or may be financially prohibitive, however, this Court should recognize that the order compelling arbitration effectively ends the litigation, separate and apart from the statutory provisions at issue here, and thus is appealable under the "death knell" doctrine.

## ARGUMENT

### I. WHEN PROHIBITIVE ARBITRATION COSTS ARE BEING CHARGED THROUGHOUT THE NATION, THE FAILURE OF AN ARBITRATION CLAUSE TO PROTECT AGAINST THOSE COSTS IS LIKELY TO DETER CONSUMERS FROM PURSUING ARBITRATION.

The arbitration clause imposed by Green Tree upon Ms. Randolph was silent on the subject of costs. It left open the possibility that the consumer would be required to pay half or even all of the arbitrators' fees. The clause placed no limit upon the total fees that an arbitrator might charge, and no limit upon the hourly rate or filing fees that an arbitrator (or worse, possibly a *panel* of arbitrators) might charge. So far as Ms. Randolph or any consumer could tell when looking at Green Tree's arbitration clause, it was entirely possible that the costs could be very high. For Ms. Randolph, the act of filing a claim in arbitration was the equivalent of signing a blank check, with the amount to be filled in later by some unidentified arbitrator. While that might not render the provision unenforceable if arbitrators' costs routinely tracked those of courts, the disturbing truth is that arbitrators throughout the nation often charge such prohibitive costs that no reasonable consumer would resort to arbitration. Under these circumstances, the Court of Appeals acted reasonably in determining that such uncertainty about costs was likely to deter many consumers from pursuing their statutory claims, thus undermining the role of arbitration as just another forum.[2]

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[2]In this case, Green Tree claims that Ms. Randolph has waived her Seventh Amendment right to a jury trial. But how can consent to a waiver (continued...)

While the court system is publicly funded and made available at only nominal costs to taxpayers, most arbitrators are paid on an hourly basis for their work. Just as with any other service that a consumer might purchase, no economically rational consumer would pursue a claim – even if it was a claim arising under some important federal statute, and even if she or he had a strong claim and deserved to win – if she or he believed that the cost of purchasing arbitration services could be prohibitively high. It is basic economics, not "hostility to arbitration," to note that the potential cost of proceeding with arbitration is a central consideration for the vast majority of consumers. Most people pursue their legal claims to obtain financial relief, and if they face the possibility of very large costs – possibly even costs that will exceed their recovery – this will have a huge impact on their willingness to go forward.

The experience of mandatory arbitration in the last five years has generated a large number of cases where arbitration service providers impose significant costs upon individuals. Nearly all arbitration service providers charge both filing fees and hourly arbitrators' fees for conducting hearings, deciding motions, and the like. Some arbitrators also charge fees for travel or room rentals, among other things. Our point is not that *all* mandatory arbitration processes require individuals to pay hefty arbitral fees (they do not), and our point is not that

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[2](...continued)
of a constitutional right be "knowing and intelligent" when the person was required to waive the right in favor of an alternative arbitral forum without knowing whether the forum would cost so much that it would never be used? *Cf. D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (pre-dispute waiver of defenses must be knowing and intelligent); *Erie Telecomm., Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988) (standard that waiver of jury right must be knowing and intelligent applies in civil cases).

mandatory arbitration is always more expensive than litigation in court (it is not). Instead, our point is that mandatory arbitration systems often require individuals to pay costs that are so prohibitive that reasonable consumers would abandon their claims before resorting to arbitration. In light of this fact, the Court of Appeals reasonably concluded that many consumers might be concerned about pursuing arbitration in a setting where the costs were not disclosed.

A host of judicial opinions around the country attest to the fact that many individuals asserting statutory claims against corporations have confronted arbitration fees that amounted to thousands of dollars in settings where these fees would discourage the individuals from pursuing those claims:

- In *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (N.Y. App. 1998), an arbitration clause required individuals to pay an advance fee of $4,000 (which the court noted exceeded the cost of most of the defendant's products), half of which "was nonrefundable even if the consumer prevailed at the arbitration." 676 N.Y.S.2d at 571. The "[c]onsumers would also incur travel expenses disproportionate to the damages sought. . . ." *Id.* The court found "that the excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process." *Id.* at 574.

- In *Myers v. Terminex*, 697 N.E.2d 277, 280-81 (Ohio Ct. Comm. Pleas 1998), the court found that the arbitration clause would require the consumer plaintiff to pay a filing fee of $2,000, and held this to be unconscionable in the context of that case.

- In *Pitchford v. Oakwood Mobile Homes*, 1999 U.S. Dist. LEXIS 20596 at *29-30 (W.D. Va. Dec. 20, 1999), the court noted that the consumer faced fees of more than $1,000. In the context of that case, the court found that these fees "present an insurmountable economic barrier for vindicating plaintiff's rights in the arbitrable forum. . . ." *Id.*

- In *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993), *rev. denied*, 1993 Cal. LEXIS 4322 (Aug. 12, 1993), *cert. denied*, 510 U.S. 1176 (1994), the court found that a borrower would have to pay at least $850 to get a participatory hearing over debts as small as $2,000, and that these fees (along with other procedures) "become oppressive when applied to unsophisticated borrowers of limited means in disputes over small claims." *Id.* at 566-67.

- In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997), the court noted that arbitrators' fees range from $500 to $1,000 per day. The Court of Appeals concluded that it was unacceptable to impose fees of this magnitude upon individuals bringing statutory civil rights claims, as doing so would discourage the individuals from vindicating their statutory rights.[3]

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[3] *Cole*, like several of the cases that follow, involves arbitration in the employment setting rather than the consumer setting. The reasons that much of the available data comes from the employment setting are that (a) there has been far more arbitration in the employment setting than in the consumer setting until the explosive growth in the latter setting of the last several years and (b) since individual consumer claims tend to be for lower dollar figures than most employment claims, far more consumer plaintiffs

(continued...)

- In *Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230, 1235 (10th Cir. 1999), the court refused to compel arbitration where the claimant would be required to pay one-half of the arbitrator's fees – an amount projected to total between $1875 and $5000 – to resolve a discrimination claim against his employer. The court found that the agreement was unenforceable, "plac[ing] Mr. Shankle between the proverbial rock and a hard place – it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." 163 F.3d at 1235.

- In *Paladino v. Avnet Computer Tech, Inc.* 134 F.3d 1054 (11th Cir. 1998), the court noted that the clause at issue would require individuals to pay a filing fee of $2,000, plus an indeterminate sum for the arbitrators' fees. The court found that "costs of this magnitude [are] a legitimate basis for a conclusion that the clause does not comport with statutory policy" enabling persons subjected to workplace discrimination to vindicate their rights. *Id.* at 1062.

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[3](...continued)
have simply abandoned their statutory claims rather than pursue them in arbitration. As one indication that few consumers choose to avail themselves of arbitration, recent statistics indicate that while First USA, a large credit card company, has initiated more than 50,000 arbitration actions against its cardholders before the National Arbitration Forum, the cardholders themselves have initiated only four (4) arbitration actions against the company. *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-sided*, Wash. Post, Mar. 1, 2000.

- In *Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999), "the Arbitration Policy require[d] Plaintiff to pay one-half of the arbitrator's fee, the court reporter's fee, the fee for the arbitrator's copy of the transcript, and facility costs." In light of the expected size of these fees and the plaintiff's limited resources, the court found that "the prohibitive cost substantially limits the use of the arbitral forum." *Id.*

- In *Hornstein v. Mortgage Market, Inc.*, 1999 U.S. Dist. LEXIS 21463 (D. Or. Jan. 7, 1999), a clause required plaintiffs in a wage and hour claim case to pay half of all arbitration fees to pursue their claims. The court found that this provision "unabashedly violates the letter and spirit of the [Fair Labor Standards Act] and Oregon wage and hour laws by denying the basic right of participation in the adjudicatory process." *Id.* at *9.

- In *Matter of Arbitration Between Teleserve Sys., Inc. and MCI Telecomm. Corp.*, 659 N.Y.S.2d 659, 660, 664 (N.Y. App. 1997), the court noted that the arbitration filing fee alone for the claimant in an antitrust dispute would amount to more than $200,000. The court held that this fee was "patently excessive." *Id.* at 664. "The practical effect of such an oppressive and burdensome fee is to bar arbitration of" the plaintiff's claims.

The reported cases constitute just the tip of the iceberg on this point. *Amici* have lodged with the Court documents from a handful of additional cases illustrating the problem of prohibitive fees in greater detail:

- In *Warner v. Von Buettner Ristow*, a woman alleging sexual harassment was required to pay $18,260 to the American Arbitration Association ("AAA") to arbitrate her claim. TLPJ/ATLA/NELA Lodging at 1-4. When she did not prevail on the claim, the arbitrator assessed Ms. Warner $207,271.00. Lodging at 3-4.

- In *Sharpton v. Central Reserve Life Ins. Co.*, a woman claiming that her health insurer should cover a transplant was directed to pay each member of a panel of arbitrators $900 a day for hearings, and $135 per hour for study time. Lodging at 5. One possible explanation for the high rates was that every one of the arbitrators suggested by AAA for the case was an employee of or an attorney for an insurance company. Lodging at 6.

- In *Mehler v. Terminex*, a husband and wife claiming personal injuries due to toxic contamination were asked to pay $7,000 for filing fees alone to arbitrate their claim after Terminex instituted arbitration proceedings against them. Lodging at 8.

- In *Crandall v. Century Manufactured Mobile Homes, Inc.*, a husband and wife bringing warranty and state consumer protection claims in a case involving a defective mobile home were instructed to pay a $5,000 initial retainer fee (their share of a total initial fee of $20,000), and told that the arbitrator "would not be surprised" if his eventual total fee was even higher. Lodging at 9.

- In *Morse v. Don Fox Mobile Home Sales*, consumers raising warranty and state consumer protection claims

relating to a defective mobile home were given an "interim bill" by the arbitrator for $4,957.50, and were instructed to pay half this sum. Lodging at 10-12.

- Individuals with employment claims in New York Stock Exchange arbitrations regularly face very large forum fees. In *Wolfe v. Schwab*, for example, the claimant was assessed $41,400 in forum fees, Lodging at 14; in *Krasner v. Shearson Lehman Bros., Inc.*, the claimant was assessed $24,500 in forum fees, Lodging at 15; in *Vickers v. The First Boston Corp.*, the claimant was assessed $9,150 in forum fees, Lodging at 16; and in *Tortora v. Merrill Lynch Pierce Fenner & Smith*, the claimant was assessed $6,600 in fees. Lodging at 13.

A number of academic and legal commentators have also reported that arbitration service providers frequently charge very high fees to individuals as a condition of pursuing their claims. *See* Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293, 306-307 (1999):

> I . . . think that some courts still subscribe to the fond, but misguided, view that employment arbitration is invariably quick and cheap. The simple truth is it just ain't necessarily so. When we researched the subject in connection with the appeal in Cole v. Burns, we found that . . . JAMS/Endispute arbitrators charged an average of $400 per hour, but fees of $500 or $600 per hour were not uncommon. CPR Institute for Dispute Resolution estimated arbitrators' fees of $250 - $350 per hour and 15-40 hours of arbitrator time in a typical employment case, for

> total arbitrators' fees of $3750 to $14,000 in an 'average' case. . . . I was recently told of a case in which a private mediator billed the parties $25,000 *for one day of work*!

*See also* Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 S. Ct. Rev. 331, 384 (1996) ("The AAA charges an administrative fee for its services that is generally higher than court filing fees, and . . . most [arbitrators] must be paid by the parties, sometimes at handsome hourly rates."); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 Mich. B.J. 302, 303 (1999) ("Courts are subsidized; arbitration forums are not. Filing fees for commercial cases [which include cases brought by consumers] at the [AAA] start at $500, for claims under $10,000, and go up from there. Additional administrative fees are charged for each day of arbitration. The arbitrators themselves charge an hourly fee. . . . The AAA may require a party to deposit in advance sums of money to cover anticipated arbitrators' fees or administrative costs. Failure to pay fees and charges in full may result in suspension or termination of the arbitration proceeding.").[4]

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[4] *Accord* Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?*, 53 Disp. Resol. J. 40, 47-48 (1998) ("[S]haring the arbitrator's fees and expenses might prove an insurmountable barrier for the putative grievant. Even a relatively simple case can cost several thousand dollars; a complicated case could easily run several times that. Few grievants can afford that much of a commitment, even if an arbitrator could order reimbursement in the event the grievant prevails."); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 Fordham Urb. L.J. 311, 331-33 (1999) (citation omitted) ("[W]ith arbitration filing and administration fees totaling thousands of dollars per case, and hourly rates ranging from $200-$700, arbitration can be extremely expensive for plaintiffs, especially in

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The national news media have also widely reported the phenomenon of prohibitive arbitration fees. *See The Arbitration Trap: How Consumers Pay for 'Low Cost' Justice*, Consumer Reports, August 1999, at 64 ("Binding arbitration is touted as a low-cost way to get justice, but it can end up costlier than taking a case to court. Consumers may have to pay for the arbitrator's time, which can run $300 or more per hour – effectively ruling out arbitration's usefulness in cases involving small claims"); Mark Curriden, *Arbitration Is Weapon Against Liability*, Dallas Morning News, May 12, 2000 ("Mr. Wheeler [a truck driver with a badly damaged house]'s only legal remedy is to complain to a private arbitrator belonging to an association chosen by the developer. That would cost him a $3,000 advance fee, and he wouldn't be allowed to appeal a loss. So he has given up.").[5]

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[4](...continued)
more complex cases, and particularly in light of the fact that plaintiffs are almost always required to pay at least half of the costs. As such, an out-of-work plaintiff facing a 'deep pocket' [defendant] may be severely disadvantaged.").

[5]*See also* Christine Dugas, *Arbitration Might Be Only Choice*, USA Today, August 27, 1999 ("Although arbitration is supposed to be inexpensive, that's not always the case. For example, JAMS/Endispute requires each party to pay a $250 administrative fee. You will also pay an hourly fee for the arbitrator. Fees can quickly exceed the amount of small credit card claim."); Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us'*, Washington Post, May 22, 1999 ("[T]he cost of arbitration can sometimes be significantly higher than court fees, making it financially impossible for some consumers to seek relief."); Jenny Strasburg, *Proceeding Under Fire*, S. F. Examiner, April 30, 2000 (woman alleging that a physician removed her medical gown without her permission and poked her body with a safety pin charged 50% of American Arbitration Association's hearing fee of $8,600).

The foregoing demonstrates beyond any serious doubt that a large number of individuals have encountered prohibitive fees as a condition of pursuing their claims in arbitration. In light of this reality and against this backdrop, the Court of Appeals was plainly right in concluding that reasonable consumers would fear that an uncertain arbitration system would be very expensive. When individuals across America have been repeatedly hit with fees of thousands of dollars to go to arbitration, the Court of Appeals had every reason to hold that consumers with very small claims (like Ms. Randolph) would be deterred from exercising their statutory rights by an arbitration clause (like Green Tree's) that set forth no rules – and thus no limits – on arbitral fees.

## II. THE COURT OF APPEALS' REFUSAL TO IMPOSE ARBITRATION WHEN PROHIBITIVE COSTS COULD RENDER ARBITRATION A MEANINGLESS ALTERNATIVE WAS FULLY CONSISTENT WITH THE RULINGS OF THIS COURT AND NUMEROUS LOWER COURTS APPLYING THIS COURT'S REASONING.

To hear defendant and its *amici* tell it, this Court has adopted a policy favoring arbitration that is so robust as to be unqualified. Green Tree and its allies suggest that courts should embrace virtually all arbitration systems with little consideration of how or whether those systems will actually work. These advocates articulate little or no role for courts in policing particularly unfair arbitration systems, and suggest that in this case, it was impermissible "hostility" towards arbitration for the Court of Appeals to undertake such a role.

In constructing this argument, defendant and its *amici* leave untold much of the history of how federal and state courts

have reacted to the developments in the marketplace since this Court last decided a consumer arbitration case in *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995). Before *Allied-Bruce*, mandatory predispute binding arbitration was principally confined to transactions and relationships between commercial entities or the collective bargaining context. In recent years, however, these clauses have been increasingly imposed upon individual consumers in standard form contracts by a host of businesses.[6] As this landscape has changed, literally dozens of federal and state courts have undertaken to ensure that the arbitration systems imposed by corporations do not abuse the rights of individuals. Far from being a pariah in the law, the Court of Appeals' decision here fits comfortably into a broad trend that has developed over the last five years.

It should be noted that most of these judicial policing efforts involve the application of noncontroversial legal principles. This Court has instructed, for example, that courts should not enforce arbitration clauses that are unconscionable or otherwise subject to fundamental contract defenses under state law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (citation omitted) ("[C]ourts should remain attuned to well-supported claims that the agreement to arbitrate

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[6] *See* Caroline E. Mayer, *Hidden in Fine Print: You Can't Sue Us*, Washington Post, May 22, 1999 at A1 ("American Express is just one of the growing number of companies – among them banks, computer makers, insurance firms and car dealers – that are rewriting the fine print of their contracts and sales agreements to require that consumers agree, in advance, to give up their right to sue and submit any disagreements to arbitrators.") Some business advocates have explicitly endorsed this spread as a means for businesses to cap and reduce their liabilities. Alan Kaplinsky, *Excuse Me, But Who's The Predator: Banks Can Use Arbitration Clauses As A Defense*, Bus. Law. 24, 25-26 (May/June 1998) (describing arbitration as a "defense" for banks against consumer claims, and as "a powerful deterrent to class action lawsuits").

resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'."). A host of courts around the country have, therefore, refused to enforce arbitration clauses that were found to be unconscionable.[7] Similarly, many courts have refused to enforce arbitration clauses where there was evidence that the arbitrator was likely to be biased.[8]

And, perhaps most relevant to this case, numerous courts have held that individuals may not be forced into

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[7] *See, e.g., Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230 (10th Cir. 1999); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000), *appeal filed* (6th Cir. 2000); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Ct. App. 1999); *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999); *In the Matter of Arbitration Between Teleserve, Inc. and MCI Telecomm. Corp.*, 659 N.Y.S.2d 659 (N.Y. App. 1997); *Williams v. Aetna Co.*, 700 N.E.2d 859 (Ohio 1998), *cert. denied*, 526 U.S. 1051 (1999); *Turner Bros. Trucking Co.*, 8 S.W.3d 370 (Tex. Civ. App. 1999), *writ denied* (May 11, 2000); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Arnold v. United Companies Lending Co.*, 511 S.E.2d 854 (W. Va. 1998).

[8] *See Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (refusing to compel arbitration where an employer's arbitration rules were "crafted to ensure a biased decisionmaker"); *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) (arbitrator not independent where she or he was to be picked by and paid by union); *Cheng-Canindan v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867 (Ct. App. 1996) (procedure dominated by an employer would not be compelled); *Ditto v. Re/Max Preferred Properties, Inc.*, 861 P.2d 1000 (Okla. Civ. App. 1993) (where only one party had a voice in selection of arbitrator, clause would not be enforced); *In the Matter of Arbitration Between Cross & Brown Co. and Nelson*, 167 N.Y.S.2d 573, 575 (App. Div. 1957) (not enforcing an arbitration agreement that appointed the employer's Board of Directors as arbitrator); *Board of Educ. v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 443 (W. Va. 1977) (finding exclusive control over selection of arbitrators by one party inherently inequitable).

arbitration if it does not offer them the same remedies that would be available in court. *See, e.g., Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997), and cases discussed below. This body of law stems directly from the teachings of this Court, and has been applied repeatedly both to clauses that seek to re-write underlying substantive laws (e.g., arbitration clauses that prevent claimants from receiving remedies available under civil rights or consumer protection laws) and to arbitration clauses that rig the playing field so that individuals will be deterred from pursuing their claims (e.g., arbitration clauses that require individuals to pay excessive fees to have their claims heard). The Court of Appeals' decision here fits comfortably into this long line of cases.

As noted above, the many cases in this line spring from this Court's own teachings. In *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 632 (1985), this Court instructed that an arbitration clause can be set aside if "proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." In *Gilmer*, this Court conditioned its approval of arbitration on the requirement that arbitration offers remedies that are equal to those available in court. *See Gilmer,* 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). This Court did not say that the plaintiff in *Gilmer* could contractually waive his statutory claims, or that it was acceptable for the arbitration scheme at issue to effectively block the plaintiff's claims. Instead, this Court enforced the arbitration clause precisely *because* it concluded that arbitration offered the plaintiff a meaningful remedy.

Lower courts charged with applying these general principles have refined them to derive the following rule: arbitration must offer "all of the types of relief that would otherwise be available in court" before a court will compel arbitration. *Cole*, 105 F.3d at 1482. As the U.S. Court of Appeals for the Sixth Circuit held two months ago:

> [E]ven if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions.

*Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000). *See also Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J. concurring, for a majority of the court) (the arbitrability of claims under Title VII "rests on the assumption that the arbitration clause permits relief equivalent to court remedies. . . . When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable.") (citing *Cole*); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (invalidating an arbitration agreement that required a claimant to forfeit rights and benefits guaranteed by the Petroleum Marketing Practices Act, including imposing a limit on the recovery of punitive damages and attorneys' fees and a one-

year statute of limitations).[9] Taken together, these cases stand for a simple and powerful proposition: courts should not compel mandatory arbitration unless the arbitrator has the power to provide a claimant with all of the relief to which he or she is entitled.

This line of cases gave rise to a necessary corollary: just as courts have refused to enforce arbitration clauses that explicitly eliminated the remedies available to individuals, courts have also refused to enforce arbitration clauses that rigged procedural rules in such a way as to effectively deny individuals meaningful remedies. The most numerous and important of these cases have held that arbitration clauses may not require plaintiffs to pay fees that might discourage or prevent a party from bringing a claim. This conclusion was reached in each of the cases cited in Part I, *supra (Cole, Paladino, Shankle,* etc.). *See also Giles v. New York*, 41 F. Supp. 2d 308, 313 (S.D.N.Y. 1999) ("[M]andatory arbitration

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[9] *See also Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 697 (7th Cir. 1984) (holding that arbitration offended due process where arbitrator could not award full common law damages nor prevent harm to constructively discharged plaintiff before it occurred); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 256 (S.D.N.Y. 1998) ("[A]rbitration must allow remedies central to the statutory scheme . . . [and] sufficient to satisfy statutory purposes."); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (voiding provision of arbitration agreement that disallowed attorneys' fees to prevailing plaintiff in Title VII claim after concluding that "contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 185 (D. Mass. 1997) (allowing plaintiff to pursue judicial claim under the Americans with Disabilities Act where arbitration agreement did not authorize arbitrator to provide remedy of 'reasonable accommodation' which plaintiff was entitled to pursue under the Act).

provision featuring fee-splitting is unenforceable because it deprives individuals of their required 'reasonable right of access to neutral forum.'") (citing *Cole v. Burns*); *Baron v. Best Buy Co., Inc.*, 79 F. Supp. 2d 1350, 1355 (S.D. Fla. 1999) ("[A]rbitration agreement which limits or precludes statutory remedies, or which possibly makes an individual responsible for arbitration fees and costs, is unenforceable.") *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255-56 ("[A]rbitration agreement cannot impose financial burdens on plaintiff access to the arbitral forum."); *Rembert v. Ryan's Family Steak Houses*, 596 N.W. 2d 208, 255, 288 (1999) (one of the "baseline fundamentals" for a fair arbitration process is that it "does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum").[10]

Defendant suggests that this Court has so favored arbitration that the clause should be enforced here even if the

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[10]While each of the above courts concluded that it is not acceptable for arbitration clauses to require individuals to pay prohibitive fees to pursue claims in arbitration, several of the courts still required the individuals to take their claims to arbitration, but effectively re-wrote the contract so that the corporate defendant was required to pay these fees. *See, e.g., Cole, Jones*; and *Teleserve*. We believe, however, that the more appropriate judicial response is to strike the arbitration clause. This Court has instructed that the "primary purpose" of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr., Univ.*, 489 U.S. 468, 479 (1989). If a private agreement to arbitrate cannot be enforced according to its terms, the courts should refuse to enforce it. They should not draft and enforce a new "agreement" to arbitrate of their own making. Where a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of a court to supply the legal acumen to re-write the contract to find a legal way for the drafter to enjoy the otherwise-unobtainable results it sought.

Court of Appeals was right in concluding that defendant's arbitration clause's failure to limit arbitration fees would deter plaintiff from pursuing her statutory claims in arbitration. In effect, defendant asks this Court to do far more than reverse the Court of Appeals in this case. In reality, defendant asks this Court to back away from its insistence that arbitration be "just another forum," to disapprove of a host of recent cases where courts have given concrete meaning to this Court's instruction in *Mitsubishi* and *Gilmer*. This Court should reject defendant's request, and make clear that arbitration clauses will only be enforced where they do not explicitly or effectively eliminate statutory remedies for individuals.[11]

## III. THE POSSIBILITY THAT PREVAILING PLAINTIFFS MAY RECOVER THEIR ARBITRATION FEES DOES NOT SAVE DEFENDANT'S ARBITRATION CLAUSE, AS THIS "LOSER PAYS RULE" UNDERMINES TILA AND DETERS PLAINTIFFS FROM PURSUING THEIR CLAIMS THROUGH ARBITRATION.

While the arbitration clause in this case is silent on the subject of costs, *see* Part I *supra*, Green Tree nevertheless contends that the arbitration clause adequately protects against the possibility of enormous arbitral costs by implicitly requiring the arbitrator to order that the defendant reimburse a prevailing

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[11] If this Court chooses to embrace the proposition that arbitration clauses may not impose fees large enough to deter persons from pursuing statutory claims, but agrees with the argument of defendant that the Court of Appeals did not have a sufficient factual basis to conclude that this clause would have such a deterrent effect, we respectfully suggest that this Court should remand the case to expand the factual record, rather than (as defendant suggests) order that the arbitration clause be enforced.

consumer for any arbitration fees or costs. *E.g.*, Petitioner's Brief at 3. This asserted protection amounts at best, to a "Loser Pays Rule." In other words, under defendant's reading of its clause, only a consumer who *prevails* on a TILA claim would owe no costs or fees to the arbitrator. Any consumer who does *not* prevail would, however, apparently still be subject to whatever fees an arbitrator might choose to impose. (As established above, the consumer could easily face filing fees and arbitrators' hourly fees amounting to thousands of dollars.)

Defendant's reading of this clause turns it into a back-door tort reform measure, a "Loser Pays Rule" that substantially shifts the law from where it stands under TILA. Like many consumer protection statutes, TILA provides that a prevailing plaintiff shall recover her or his attorneys' fees, but a defendant shall only recover attorneys' fees if the plaintiffs' claims were frivolous.[12] Fees may only be awarded against losing plaintiffs in extreme cases, not, as with defendants' arbitration clause, against any plaintiff who happens ultimately to lose her or his case:

> Unlike prevailing plaintiffs who are ordinarily entitled to fees in civil rights cases, prevailing defendants may not recover fees unless they can show that the plaintiff's action was frivolous, unreasonable, or without foundation, or when

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[12]TILA, like most statutes providing causes of action for individuals against corporations and institutional defendants, provides for attorneys' fees only to prevailing plaintiffs (and not prevailing defendants). *See* Alba Conte, 1 *Attorney Fee Awards* § 5.01 at 266 n. 1 (1993) (statutes providing attorneys' fees only to prevailing plaintiffs include TILA, the Consumer Credit Protection Act, the Fair Debt Collection Practices Act, the Consumer Product Safety Act, ERISA, the Clayton Act, and the Equal Credit Opportunity Act).

> plaintiff continues to litigate a case after the lack of foundation becomes evident. Courts generally have concluded that an award of attorneys' fees against a losing plaintiff is an extreme sanction and must be limited to truly egregious cases of misconduct.

Conte, § 1.05 at 9 (footnotes omitted).

This Court has enunciated the simple and sensible reason for this rule: requiring individuals to pay a defendant's attorneys' fees merely because they do not prevail would discourage plaintiffs from seeking protection of the law. "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). The *Christiansburg* logic applies fully to consumer protection statutes like TILA. *See Postow v. OBA Federal S&L Ass'n*, 627 F.2d 1370, 1387-88 (D.C. Cir. 1980). The "loser pays rule" is not a minor procedural rule, a mere part of "another forum." Such a rule would deter most consumers from pursuing any relief no matter how strong their claims.

## IV. WHERE AN ARBITRATION CLAUSE POSING THE THREAT OF PROHIBITIVE COSTS EFFECTIVELY BARS INDIVIDUALS FROM PURSUING THEIR CLAIMS, REQUIRING AN INDIVIDUAL TO NONETHELESS PURSUE ARBITRATION AS A PRECONDITION OF FILING AN APPEAL OF AN ORDER COMPELLING ARBITRATION WILL DENY ALL APPELLATE REVIEW.

For all of the reasons set forth above, the Court of Appeals correctly concluded that Green Tree's arbitration clause is unenforceable. Concerned that this Court will reach the same conclusion, defendant insists that the district court's decision enforcing arbitration should not be appealable – so the validity of Green Tree's arbitration clause cannot be considered. As we have demonstrated above, many individuals have been deterred and often barred from pursuing their claims in arbitration by the threat or the immediate reality of prohibitive arbitration fees. Yet defendant contends that, even if a trial court faced with such a case were to err and compel arbitration despite the meaninglessness of the arbitral remedy, the incorrect trial court order simply could not be appealed.

It is easy to see why Green Tree and its *amici* would desire this result: it would render pro-defendant district court opinions unreviewable. Individual plaintiffs hit with an erroneous order compelling arbitration would face a Catch-22: you can't appeal unless you arbitrate first, and you can't arbitrate first because you may or will face prohibitive costs. Under this scenario, district court orders compelling arbitration could not be appealed because plaintiffs could not risk the ruinous costs imposed by proceeding to arbitration. Parties supporting forced arbitration will naturally favor such a result,

but it is flatly inconsistent with core doctrines of law relating to appealability.

We realize that statutory interpretation issues could be relevant here. We do not address them because they will be amply addressed by the parties. We write separately to suggest that, apart from the language of the Federal Arbitration Act, there is another doctrine available to resolve this issue in favor of the consumer plaintiff here. Since few if any consumers would dare to face the potentially unlimited arbitral fees threatened by the silent arbitration clause here, an order compelling arbitration effectively sounds the "death knell" of the plaintiffs' case. As a result, the order is appealable under the well-established "death knell" doctrine.

There is a rich history in the federal courts of allowing immediate appeal when an court order has the same practical effect of a dismissal. This doctrine of appealability has been appropriately named the "death knell" doctrine because it arises whenever an order that seems interlocutory actually ends the plaintiff's case. "[W]hen a plaintiff's action is effectively dead, the order which killed it must be viewed as final." *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). The rationale behind this rule is that just as *actual* dismissal is reviewable for judicial error or misapplication of the law, so should *practical* dismissal be reviewable. Otherwise, the plaintiff will lose the right to a full and just review of her claim. *McKnight,* 667 F.2d at 479 ("[An] order is held to be appealable when the effect of the denial of an immediate appeal . . . would effectively deny the litigants their day in court.").

Courts have invoked the death knell doctrine in a number of situations where, as here, an interlocutory order effectively cut off a plaintiff's ability to pursue her claim. In

one line of cases, courts have allowed immediate appeal from stay orders because the plaintiff's particular circumstances made a temporary stay effectively permanent. In *McKnight v. Blanchard*, 667 F.2d at 479, for instance, the court held that the plaintiff prisoner could appeal an order which stayed his action for injunctive relief until he was released from prison. Because the plaintiff would probably not get out of prison for seven or more years, and because his witnesses might not be available at that point, the court said that the stay order sounded the death knell for his claim. *See also Muhammad v. Baltimore City Jail*, 849 F.2d 107, 110 (4th Cir. 1988) (allowing an appeal from an order granting a stay of a prisoner's civil rights, pending his release from prison; while finality is usually only satisfied when an order "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," an order is appealable that, "though it does not technically end his action, does so in practical effect.").

Courts have also allowed immediate appeal when an order would place the plaintiff in a situation where further action on her claim, if not impossible, is probably futile. *See Culbertson v. Sec'y of Health and Hum. Servs.*, 859 F.2d 319, 333 (4th Cir. 1988) ("Certain judicial orders may well carry a 'death-knell' or 'practical finality' quality. In such circumstances, it is entirely appropriate for a reviewing court to treat as final an order that 'effectively kills' a party's action."); *Hines v. D'Artois*, 531 F.2d 726, 740 (5th Cir. 1976) (holding that an order remanding plaintiff's case to the EEOC, when the EEOC takes years to process claims, would give rise to a state of "suspended animation" akin to "effective death" of the claim.). This situation has also arisen in the context of forum transfers. *See, e.g., U.S. v. Berkowitz*, 328 F.2d 358, 360 (3d Cir. 1964) (allowing appeal from an order denying transfer

from a court with no jurisdiction over the defendant, because the order would "effectively terminate the lawsuit."). [13]

This Court should apply the same logic and allow appeal in the instant case, where overwhelming evidence on the excessive cost of arbitration – especially where costs are not specified in the arbitration clause – supports the probability that the motion to compel arbitration sounds a ringing death knell for the plaintiff's entire claim. If the arbitration forum is not truly available, appellate review should be.

## CONCLUSION

The decision of the Court of Appeals should be affirmed.

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[13] At least two circuits and a host of district courts have held that a party will suffer per se irreparable harm if it is forced to arbitrate when it has not agreed to do so. *Cf. McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997); *Painewebber, Inc. v. Hartmann*, 921 F.2d 507, 514-15 (3d Cir. 1990); *GTFM, LLC, v. TKN Sales, Inc.*, 2000 U.S. Dist. LEXIS 4488 at *6 (S.D.N.Y. April 10, 2000) ("[A] party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so."); *SEMCO, LLC v. Ellicott Mach. Corp.*, 1999 U.S. Dist. LEXIS 10710 at *8 (E.D. La. July 9, 1999) ("Courts have recognized that the wrongful enforcement of an arbitration clause in and of itself constitutes irreparable harm."); *Chicago Sch. Reform Bd. of Trustees v. Diversified Pharm. Servs., Inc.*, 40 F. Supp. 2d 987 (N.D. Ill. 1999).

Respectfully submitted,

F. Paul Bland, Jr.
(Counsel of Record)
Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW
Suite 800
Washington, D.C. 20036
(202) 797-8600
(202) 232-7203 (Facsimile)

Jeffrey White
Association of Trial Lawyers of America
1050 31st Street, NW
Washington, D. C. 20007
(202) 965-3500
(202) 965- 0920 (Facsimile)

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IN THE

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP. -- ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
*Petitioners*,

v.

LARKETTA RANDOLPH,
*Respondent.*

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

## BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

ALAN B. MORRISON
(Counsel of Record)
PAUL LEVY
MICHAEL J. QUIRK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for *Amicus Curiae* Public Citizen

July 24, 2000

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## INTEREST OF THE AMICUS[1]

Public Citizen is a national consumer organization with approximately 150,000 members. While Public Citizen recognizes the appropriate role that consensual arbitration plays, it has a longstanding interest in preventing large institutions from compelling consumers and workers to forgo their rights to proceed in court, especially where, as here, arbitration does not merely involve a change in forum, but also affects a significant reduction in remedies and other rights, either as a matter of law or, as here, as a matter of practical necessity. In addition, the rights of the thousands of absent members of the class that respondent sought to maintain in this action will be effectively determined by whether the decision of the Eleventh Circuit is upheld. Because Public Citizen regularly participates in class actions to protect the interests of absent class members, its brief here will focus on their interests in having the decision below affirmed.

Amicus agrees with the arguments made in respondent's brief, and they will not be repeated here. Instead, amicus will provide a detailed history of the Federal Arbitration Act of 1925 to establish that the Act was not intended to be an unqualified endorsement of arbitration under all circumstances, but a more limited approval of consensual agreements between businesses to arbitrate their differences, without altering the substantive rights of either party. In this case, compelled arbitration of the Truth in Lending Act claims of respondent

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[1] Letters of consent to the filing of this *amicus* brief have been lodged with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that no party had any role in writing this brief and that no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

and the class that she seeks to represent would effectively foreclose the exercise of their rights because of the costs that claimants would have to incur in pursuing arbitration and because of the absence of class action remedies that are essential to TILA enforcement. Thus, compelling arbitration here would not further the purposes of the FAA and would undermine the purposes of TILA, as the Eleventh Circuit correctly held.

Finally, although we agree with respondent that the decision below should be affirmed, we do not support her suggestion that, if the agreement at issue here had somehow specifically authorized class arbitration, that would have cured this defect. In our view, only an instrumentality of government, and not a private arbitrator, can issue orders that can bind absent class members. In taking this position, amicus provides a perspective entirely different from those of the parties.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a claim brought by a mobile-home purchaser against her mortgage company on behalf of herself and a proposed class of borrowers under the Truth In Lending Act's express class action provisions. Respondent's complaint sought class certification and appropriate class-wide relief for petitioner's failure to inform consumers that its financing documents required them to purchase a $15 vendors' single-interest insurance policy. In its contracts with each class member, petitioner included an extremely broad and identical arbitration provision that requires borrowers to arbitrate all contractual and statutory claims for both damages and injunctions. The contract does nothing to change the general rule that the parties to an arbitration must share forum costs, such as the fees of the decision-maker, unlike in court proceedings where judges are paid by the government.

Moreover, despite the breadth of the arbitration clause, it makes no mention of class actions and plainly does not contemplate that a private arbitrator would have the power, let alone the tools, to adjudicate these claims on a class-wide basis.

Although the District Court recognized that requiring arbitration here would almost certainly end this proceeding, it concluded that it had no choice but to order arbitration and to dismiss the case with prejudice, a ruling to which it adhered on respondent's motion for reconsideration. The Court of Appeals reversed, concluding that it had jurisdiction over a final decision of dismissal and finding that the failure to shift the burden of the expenses of arbitration to petitioner fundamentally interfered with respondent's enforcement of TILA in these circumstances.

Amicus agrees with respondent that the Court of Appeals had jurisdiction over her appeal. Section 1291 of Title 28 provides for jurisdiction over "final decisions"of district courts, and Section 16(a)(3) of the FAA confirms that authority using identical terminology, with no qualifications whatsoever. Petitioner never explains what else remains to be done to make the decision final, nor when else a person who declines to arbitrate, as respondent did here, could take an "appeal" from this order of dismissal, let alone how a person who prevails in arbitration can "appeal" a victory in that forum, when the real objection is to the defeat in the judicial forum that occurred well in the past. Finally, of particular interest to amicus, what would happen to the claims of absent class members while the case was wending its way through arbitration, and, in particular, would their statutes of limitations be tolled until somehow the class representative was able to appeal the final decision of dismissal? All of those problems can be avoided by reading "final decision" in Section 16(a)(3) to mean what it has always meant: A losing party may take an appeal whenever, as

here, there is nothing left to be done in the District Court.

Contrary to the assertions by petitioner and its amici, the FAA was never intended to be a paean to arbitration to the exclusion of all other interests. The history of the FAA makes clear that it was enacted in response to the refusal of courts to enforce arbitration agreements and even arbitration awards between businesses. Congress recognized other values in the Act and never contemplated that statutory claims, which depend on the courts for meaningful enforcement, would be undermined by the kind of pre-dispute arbitration clauses inserted by petitioner here in all of its contracts. It is not our position that statutory claims are never a proper subject of arbitration, but that the history of the Act confirms this Court's recognition in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), that arbitration clauses cannot undermine the effective enforcement of substantive rights, particularly those under laws like TILA that are intended to override ordinary principles of contract law.

That approach is of particular significance here, where the class action device has been recognized by Congress as vital to TILA enforcement. As respondent demonstrates, the absence of a class action mechanism, as well as the lack of a requirement that petitioner bear the cost of arbitration, makes these TILA claims effectively unenforceable if she must proceed in arbitration. But even if petitioner agreed to pay for arbitration costs and purported to create a class action arbitration forum, that would be of no avail. Consistent with due process, a non-party can lose his or her claim only by governmental action, not by a private arbitration. Thus, absent class members have the right to the protection of a court before their claims are adjudicated, and only a unit of government, not a private party like petitioner, can create such a forum. This Court need not pass on the legality of such a hypothetical

private class action mechanism, but the obvious and serious problems with the concept provide a further reason to conclude that a court, not an arbitrator, must pass on the merits of these statutory claims.

## ARGUMENT

The decision of the Court of Appeals below should be affirmed.

### I. Congress Never Intended the Federal Arbitration Act to Allow a Party Effectively to Extinguish Opposing Legal Claims by Imposing Prohibitive Arbitration Costs on Their Enforcement.

Petitioner attempts to answer the questions presented in this case primarily by reference to an "emphatic" federal policy favoring arbitration. In arguing that the Federal Arbitration Act's express provision for the appeal of a "final decision with respect to an arbitration that is subject to this title," 9 U.S.C. § 16(a)(3), does not apply to the district court's decision dismissing all of respondent's claims with prejudice, petitioner relies foremost on the FAA's "object and policy" favoring arbitration. Br. at 21. Asserting that its arbitration clause should be enforced despite its threat to impose hundreds of dollars in additional forum costs on consumers seeking to enforce their $200 Truth In Lending Act claims, petitioner recites the enforcement language of Section 2 of the FAA, Br. at 31, on the assumption that it applies to all arbitration agreements, no matter what the subject or how the agreement affects substantive rights.

The history of the FAA, however, provides no support for petitioner's invocation of a boundless federal policy

favoring arbitration of all disputes between contracting parties. The events leading to the FAA's passage demonstrate a prevailing consensus that arbitration was an expeditious and cost-effective mechanism for resolving business contract disputes. Although this Court has subsequently recognized broader applications of the Act to statutory claims, *Mitsubishi*, 473 U.S. at 626-27; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), and to disputes arising from consumer transactions, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court has also been careful to ensure that arbitration continues to serve the Act's dual goals of allowing for faster and cheaper resolution procedures, while preserving all of a party's legal remedies. *See, e.g., Mitsubishi*, 473 U.S. at 628:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Petitioner's use of arbitration in this case threatens plaintiffs with arbitration-specific costs that would prevent them from vindicating their rights under the Truth In Lending Act. This use of mandatory arbitration would exceed the bounds set by the FAA's underlying policy goals and thus requires the Court to reassert the limitations set by Congress on the FAA's enforcement.

The history of the Federal Arbitration Act defines the contours of federal policy regarding arbitration. While Section 2 speaks generally to enforcement of a "contract evidencing a transaction in interstate commerce," for the settlement of a

"controversy thereafter arising out of such contract," 9 U.S.C. § 2, the process culminating in the FAA's passage in 1925 makes clear the circumstances in which the Act provides for the enforcement of arbitration. This history reveals more than isolated statements as to the Act's likely application; it demonstrates an overwhelming consensus among legislators, drafters and supporters, as confirmed by the then-prevailing state law, that arbitration was to be used to provide a faster and cheaper method for resolving contractual disputes between businesses. On proper uses of legislative history, *compare Tennessee Valley Authority v. Hill*, 437 U.S. 153, 177 (1978) ("The legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species"), *with Securities and Exchange Comm'n v. Sloan*, 436 U.S. 103, 121 (1978) ("We are extremely hesitant to presume general congressional awareness...based only upon a few isolated statements in the thousands of pages of legislative documents"). As we now show, petitioner's attempt to use arbitration to create barriers to plaintiffs' assertion of statutory claims is wholly unjustified by reference to the FAA's history and purposes.

Congress enacted the Federal Arbitration Act in 1925 to allow businesses to resolve their contractual disputes before experienced decision-makers in expedited, cost-effective proceedings. The FAA was the legislative culmination of a process that the American Bar Association set into motion to obtain congressional authorization for federal courts to enforce arbitration agreements in maritime and interstate commercial contracts. *See* Joint Hearings on S. 1005 and R. 646 before the Subcommittees of the Judiciary Committees (Joint Hearings), 68th Cong., 1st Sess. 34 (1924). The ABA's Committee on Commerce, Trade, and Commercial Law described its legislative proposal thus:

> [T]he adoption of ...the Federal statute and the uniform State statute will put the United States in the forefront in this procedural reform. It will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the Federal and State courts.

Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. (Senate Subcommittee Hearing) 14 (1923). The ABA's legislative proposal was intended to provide merchants with faster and cheaper procedures for resolving commercial contract disputes, and was not intended to establish a general federal policy favoring arbitration of all controversies between contracting parties. *See* Report of Standing Committee on Commerce, Trade and Commercial Law, 50 ABA Rep. 356, 361 (1925) (arbitration's "appropriate field in respect to future disputes is somewhat qualified and limited. It is, in our opinion, desirable that this Association should lend its influence and aid to arbitration within its proper field.") (quoting committee study of Association of the Bar of the City of New York).

The ABA drafted the proposed federal arbitration law in response to problems experienced primarily by commercial actors. In addition to the costs of litigation, the ABA drafters were concerned with delays that the litigation process entailed, "especially in recent years in centers of commercial activity, where there has arisen great congestion of the court calendars," and with the

> failure, through litigation, to reach a decision regarded as just when measured by the

> standards of the business world. This failure may result either because the courts necessarily apply general rules which do not always fit a specific case, and [sic] because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy.

Joint Hearings 34-35 (ABA Brief on proposed Federal arbitration statute). These limited purposes should signal caution whenever the Act is invoked outside the context of business contract disputes. Statutory claims compel decision-makers to apply special rules designed to vindicate legislatively-declared public values, which exist wholly apart from, and often in conflict with, commercial norms. The Truth In Lending Act, for example, supersedes general principles of contract law, requiring decision-makers to enforce the Act's remedies to vindicate consumer protection goals. This is an entirely different function from that which the FAA's architects expected arbitrators to perform.

During congressional hearings on the bills that were later enacted as the FAA, the ABA drafters supported their legislative proposal by reference to its impact on merchants. W.H.H. Platt, chair of the ABA's commerce committee, explained to the Senate Judiciary subcommittee that the legislation responded to "quite a demand in commercial centers on the part of a good many commercial organizations to have...a vehicle constructed to effectuate an agreement to arbitrate." Senate Subcommittee Hearing 8. Julius H. Cohen, also of the ABA commerce committee, explained that federal courts "could get rid of the litigation that these business concerns can prevent by their arbitration committees" because the Act "would take out all these matters of business and leave the courts free to handle the business that ought to be handled

with dispatch." Joint Hearings 18; *see also* J.H. Cohen and K. Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926):

> Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.

The FAA was enacted with the intention that the Act would not subvert legal remedies because arbitration would be enforced only where it could provide a full and fair resolution to a dispute involving private interests.

Commercial sector supporters likewise viewed the FAA in terms of its application to contractual disputes between businesses. Charles Bernheimer of the New York Chamber of Commerce was unambiguous in expressing his understanding of this limited application of arbitration legislation:

> There are four known methods based on long experience I have had by which to meet trade

> disputes, *the ordinary everyday trade disputes, and it is for them that this legislation is proposed...*
>
> Speaking for those who have had experience and who are engaged in business, I may say this, that arbitration saves time, saves trouble, saves money. There is no question about that. We know it. *It preserves business friendships. ...Friendliness is preserved in business. It raises business standards.*

Joint Hearings 7 (emphasis added). Other supporters echoed this understanding. *Id.* at 11-12 (Gray Silver of the American Farm Bureau Federation: "we are very much in favor of the objectives of an arbitration in commercial matters, believing it will be helpful in speeding business generally"); *Id.* at 22 (M.L. Toulme of the National Wholesale Grocers' Association: "This association for many years has urged commercial arbitration"); *Id.* at 23 (Thomas Paton of American Bankers' Association: endorsing legislation "legalizing the settlement of commercial disputes"); *Id.* at 23-24 (Samuel Forbes of the Converters' Association: "we most strongly feel that the adoption of a Federal arbitration act such as is now proposed will be one of the most forward steps in commercial life. Our members have found arbitration to be expeditious, economical, and equitable, conserving business friendships and energy").

The views of the American Bankers' Association, a vocal supporter of federal arbitration legislation in the early 1920's, are also instructive regarding the disconnect between the FAA's statement of federal arbitration policy and the home mortgage borrowers' statutory claims that form the basis of the dispute here. The bankers passed the following resolution in 1923 supporting the federal bill:

> Whereas all merchants doing interstate and foreign business seek a method whereby disputes arising in their daily business transactions can be speedily, economically, and equitably disposed of; and
> Whereas arbitration offers the best means yet devised for an efficient, expeditious, and inexpensive adjustment of such disputes;
> Whereas the arbitration laws of the various States of the Union are not in uniformity and often in conflict; and
> Whereas the laws of any given State are not applicable in other States: Now therefore be it
> *Resolved.* That the commerce and marine commission of the American Bankers' Association is thoroughly in accord with the efforts being made to create Federal legislation legalizing the settlement of commercial disputes...

*Id.* at 31. The bankers' representative during the 1924 Joint Committee Hearings responded to the question of how banks stood to benefit from the Act solely by reference to business disputes:

> I think [the federal legislation] would be of indirect benefit, because [the bankers'] interests are linked up with the merchants and business men of the country; and later on it will probably be of direct benefit to the banks because it will put in their minds the idea of taking up their disputes through arbitration. Of course, the banks of the country have a great deal of business, and a great many business dealings with one another throughout the country in

> regard to bank collections, and there is a great deal of conflict in regard to those bank collections. I think this would be the best method of handling that litigation.

*Id.* The banking representatives were silent about any benefits of the Act's application to compel arbitration of statutory claims asserted by non-commercial account holders or borrowers because they, like other supporters, expected the FAA to have a narrow application to business relationships.

Prevailing arbitration law at the time of the FAA's enactment further illustrates the limited range of federal arbitration policy. The FAA's supporters repeatedly compared the federal arbitration legislation to existing state laws, particularly the New York Arbitration Law, which permitted courts to enforce agreements to arbitrate commercial disputes. The federal act was meant to parallel New York's, but would apply to maritime and interstate and foreign commercial transactions that were then deemed beyond the reach of state law. S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924); Senate Subcommittee Hearing at 2; Joint Hearings at 8, 16, 19, 24, 30, 34. The New York Arbitration Law enforced agreements to arbitrate disputes arising out of commercial contracts. Julius Cohen of the ABA's commerce committee described the public policy behind the New York statute as one of providing a "strong inducement toward adjusting trade difficulties out of court and thus preserving the good relations between the parties, while securing a fair and reasonable adjustment of the controversy at hand." Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L. J. 147, 152 (1921). Congress's understanding of the FAA at the time of its enactment was that it would apply to enforce agreements negotiated between businesses to resolve their contractual disputes.

When courts unleash the FAA from its originally intended context of contractual disputes between businesses and apply it to compel arbitration of consumer's statutory claims, they must ensure that arbitration preserves all of the consumer's legal rights. This capacity of arbitration cannot simply be presumed because consumers, unlike businesses, typically do not negotiate contractual terms, but rather accept contracts, including those with arbitration clauses, on a take-it-or-leave-it basis, have less experience and knowledge of arbitration than do the businesses against whom they assert their claims, and lack the capacity of businesses to monitor arbitral proceedings on an ongoing basis. *See*, *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1476-77 (D.C. Cir. 1997) (discussing disadvantages of individual workers in arbitration against employers). The power and experiential disadvantages of consumers in arbitration leave them vulnerable to burdens that businesses may place on their ability to enforce their legal rights. The silence of petitioner's contract as to arbitration costs, for example, requires respondent and other mortgage borrowers to face a risk of additional costs not payable in a court adjudication that may prohibit them from ever enforcing their statutory rights because their costs may exceed their expected recovery. Because Congress never intended or anticipated applications of the FAA that would create these dangers, courts cannot compel consumer arbitration by presuming the existence of consensual arrangements and fair procedures that preserve all of the consumer's legal claims. Instead, the party seeking to compel arbitration must demonstrate that these preconditions to arbitration have been satisfied.

The discussion during Congressional hearings of what federal arbitration legislation was *not* expected to cover confirms that federal arbitration policy in the FAA does not extend to petitioner's contract. In response to questions from

Senate Judiciary subcommittee Chairman Sterling and from Senator Walsh expressing concern about unequal bargaining power and compelled waivers of the right to litigate, the ABA drafters repeatedly proclaimed that the Act would not apply to insurance contracts. Senate Subcommittee Hearing at 9, 10; Joint Hearings at 15. When pressed by Senator Walsh, ABA representative W.H.H. Platt also disavowed the applicability of the proposed legislation to railroad passenger agreements because of the comparability of arbitration in these cases to prohibited contractual barriers to litigation, such as coerced reductions of statutes of limitations. Senate Subcommittee Hearing at 10 ("I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods"). The legislators' concern to avoid compelled waivers of legal rights, and the drafters' responses distinguishing contracts between parties of unequal bargaining power from the commercial contracts they sought to cover, confirm that the Act may not be used to alter substantive rights, as petitioner would do here if it prevails.

The FAA's exclusion of employment contracts from its coverage also bolsters the conclusion that the federal policy regarding arbitration is far narrower than petitioner asserts. As the bill was first proposed in the Senate in 1922, Section 2 was silent as to employment contracts, S. 4214, 67th Cong. § 2 (1922). When Committee Chairman Sterling questioned the ABA's Platt as to this possible application during the 1923 Senate hearings, Platt disavowed any intent to apply the proposed law to employment relationships:

> It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should

> feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate or foreign commerce." It is not intended that this shall be an act referring to labor disputes at all. *It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.*

Senate Subcommittee Hearing at 9 (emphasis added); *see also Id.* at 14 (Statement of Secretary of Commerce Herbert Hoover, proposing identical statutory language). In response to these proposals, Congress amended Section 1, adopting this exclusionary language to clarify the Act's non-application to employment agreements and its limited application to contracts between businesses. The purpose of Section 1's exclusionary clause—to distinguish employment from commercial contracts—also counsels this Court to proceed carefully when applying the FAA to contracts purporting to bind individuals to arbitrate their statutory disputes with businesses.[2]

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[2] This Court has granted certiorari in *Circuit City Stores, Inc. v. Adams*, 99-1379, to determine the scope of the FAA's Section 1 exclusion of employment contracts. Amicus respectfully urges that the entire discussion of the FAA's enactment herein, not merely that of Section 1, informs the correct disposition of *Adams*. Courts that have narrowed Section 1's exclusion have ignored altogether Congress's work in enacting the FAA. *See, e.g., Cole*, 105 F.3d at 1470; (deeming § 1's legislative history irrelevant to its application); *O'Neil v. Hilton Head Hosp.*, 15 F.3d 272, 274 (4th Cir. 1997). Under prevailing Commerce Clause doctrine in 1925, *see, e.g.*,

Supporters of the FAA's enactment also were unanimous in their expectation that the Act would reduce the time and expense of resolving the disputes to which the Act would apply. The House and Senate Judiciary Committees identified the delays and costs of litigation as a major impetus for federal legislation authorizing arbitration of certain disputes. H.R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). In urging passage of the legislation, the Commerce Department pointed the Committees' attention to federal court "delays amount[ing] to a virtual denial of justice." Senate Hearing at 14. The ABA's brief in support of its legislative proposal recited as one of the bill's primary benefits that it would "enable business men to settle their disputes expeditiously and economically and will reduce the congestion in the Federal and State courts." *Id.* Charles Bernheimer of the New York Chamber of Commerce concurred, informing the Joint Committees that "arbitration saves time, saves trouble, saves money." Joint Hearings at 7.

Petitioner's use of arbitration to impose forum costs on consumers vindicating statutory claims is wholly at odds with federal arbitration policy under the FAA. In order to arbitrate her statutory claim, respondent faces the threat of filing fees and arbitrator's fees, which may be in the hundreds of dollars per day, plus additional forum expenses. These costs

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*United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 455, 465 (1924) ("'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof.'") (citations omitted), the exclusion of "seamen, railroad employees, or...any workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, was tantamount to an exclusion of all workers.

effectively prohibit consumers with small claims, like respondent's $200 cause of action, from enforcing their legal rights in arbitration. To preserve the FAA's guarantee that parties may vindicate all of their legal claims, the drafter of a contract that would compel consumers to arbitrate must bear all of the costs associated with the forum, including filing fees, arbitrator's fees, and other hearings costs, that exceed the equivalent costs to litigants in court. At the very least, consumers who prevail in arbitration must be guaranteed to recover these costs plus all those provided for under 28 U.S.C. § 1920, or its state law equivalent if the case were pending in state court.[3]

The legislative history of the Federal Arbitration Act demonstrates that the Act may not be invoked to compel consumers to arbitrate statutory claims at a cost exceeding that of the equivalent judicial forum. While the Act's original application to contractual disputes between businesses has been expanded in recent years, this Court has ensured that arbitration continues to serve the underlying purposes of the Act to preserve parties' legal claims while allowing them to resolve those claims in timely and cost-effective proceedings. Petitioner's use of arbitration in this case, to threaten individual consumers with forum-specific costs as the price for asserting their statutory claims, would undermine the policy goals of the FAA and therefore the Court may not compel borrowers to arbitrate these Truth In Lending Act claims.

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[3] Respondent's Truth In Lending Act claims could also have been filed in state courts under 15 U.S.C. § 1640(c). Since this would open up small claims courts to TILA claimants, the availability of a low cost judicial forum in this case makes the deterrent effect of petitioner's shifting of arbitral forum costs to consumers that much more pronounced.

## II. The Truth In Lending Act's explicit class action remedies, which are essential to its consumer protection goals, cannot be enforced through arbitration.

Enforcement of the arbitration clause in petitioner's retail installment contract would prohibit respondent and other home mortgage borrowers from vindicating their rights to seek class-wide relief under the Truth In Lending Act. Petitioner does not dispute the contention that its arbitration clause precludes borrowers from proceeding against it as a class, but instead asserts that individual remedies are sufficient to enforce TILA. Brief at 46-47. However, TILA's class action remedies constitute a critical component of the Act's civil enforcement scheme. Because there can be no mandatory arbitration of the claims of a nationwide plaintiff class, petitioner's arbitration clause eliminates class relief under TILA and therefore is unenforceable.

### A. The Truth In Lending Act's class action remedies are essential to the effective enforcement of the Act against repeat violators.

Contractual arbitration clauses that prevent prospective litigants from effectively vindicating statutory causes of action are unenforceable. *Mitsubishi*, 473 U.S. at 637; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). In *Mitsubishi*, the Court enforced an arbitration agreement between an automobile manufacturer and a distributor as it applied to the distributor's Sherman Act counterclaims. The Court did so because the arbitration tribunal was bound to apply the Sherman Act's remedial provisions, concluding that "so long as the prospective litigant

may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637. Under this analysis, however, petitioner may not compel arbitration of respondent's Truth In Lending Act claim because arbitration will deny respondent TILA's class action remedies.

The potential for class action liability is essential to the effective enforcement of the Truth In Lending Act. TILA requires lender institutions to disclose to borrowers all credit terms and costs associated with a particular consumer loan. 15 U.S.C. § 1601(a). Civil litigation is the primary and preferred means chosen by Congress for the enforcement of TILA requirements. Sen. Rep. No. 93-278, at 14 ("[t]he purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy"); *see also Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 400 (6th Cir. 1980) ("Congress felt constrained to encourage class actions in the truth-in-lending context because of the apparent inadequacy of the Federal Trade Commission's enforcement resources and because of a continuing problem of minimal voluntary compliance with the Act on the part of creditors"). Since many TILA violations involve a lender's failure to disclose a finance charge whose cost to consumers is relatively low, borrowers suing to enforce the Act bear the risk, if unsuccessful, of having to incur expenses far in excess of the value of their individual statutory claims. See 15 U.S.C. § 1640(a) (limiting recovery for individual claimants to actual damages or $200 to $2,000 in statutory damages, plus attorney fees and costs). These costs of mandatory individual proceedings would pose an effective bar to TILA enforcement.

This Court has recognized repeatedly that class actions are necessary to preserve causes of action where individual

claims are of relatively small value:

> The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.

*Deposit Guaranty Nat'l Bank v. Roper*, 446 U.S. 326, 339 (1980); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The TILA's class action remedies even out the incentives by authorizing class recoveries of up to $500,000 plus costs and attorney fees, 15 U.S.C. § 1640(a)(2)(B), and simultaneously encourage voluntary compliance with the Act through the threat of these substantial enforcement penalties.

Congress adopted the TILA class action remedies to ensure effective civil enforcement while protecting violators of the Act from the threat of insolvency. The 1974 amendments represent a congressional response to courts' refusal to certify TILA plaintiff classes because, if each member recovered the statutory minimum, the aggregate recovery might render the lender insolvent. Sen. Rep. No. 93-278 at 14. By expressly authorizing TILA class actions, but capping class recoveries, Congress rejected the finance industry's defense of the judicial status quo and adopted the Federal Reserve Board's position that "potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform

disclosure." *Id.* at 15 (quoting Federal Reserve Board opinion). When Congress later amended Section 1640 to raise the class recovery ceiling to $500,000, it reiterated that private litigation was the Act's chief enforcement tool, that the statutory cap on class recoveries was not meant to discourage class actions, and that any impediment to class proceedings would "frustrate[] the enforcement policy for which class actions are recognized." Sen. Rep. No. 94-590, at 438; *see also Watkins*, 618 F.2d at 402 ("the legislative history surrounding these amendments convinces us that Congress did intend, by them, to encourage class actions and to use the threat of class action recoveries to force compliance with the Act"); *Johnson v. Tele-Cash, Inc.*, 82 F. Supp.2d 264, 270 (D. Del. 1999) (holding short-term loan dealer's arbitration clause unenforceable when it denies class action remedies and compels individual arbitration of TILA claims).

Petitioner's invocation of *Gilmer v. Interstate/Johnson Lane Corp.*, 500, U.S. 20 (1991), is of no avail in this case because remedies in an individual plaintiff's Age Discrimination in Employment Act case, such as *Gilmer,* include recovery of unpaid wages, reinstatement, other equitable relief, liquidated damages for willful violations, plus attorney fees and costs. 29 U.S.C. §626(b) (incorporating remedies of 29 U.S.C. § 216). Individual employment discrimination claims thus are viable on their own, and it is comparing apples and oranges to apply *Gilmer's* analysis to Truth In Lending Act claims such as this one, where individual remedies are limited to $200 to $2,000, or actual damages (here $15), plus fees and costs. *See* 15 U.S.C. § 1640(a)(1) and (2)(A). Unlike the plaintiff in *Gilmer*, TILA claimants effectively lose their claims when they are denied their statutory right to proceed as a class.

This Court has held that congressional intent to override the Federal Arbitration Act's enforcement of contractual arbitration clauses must be deducible from the overriding statute's text or legislative history or from an "inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 226-27. The legislative history of the Truth In Lending Act's class action provisions, and the Act's underlying purpose to empower consumers to provide effective enforcement through civil actions, demonstrate that petitioner's attempt to subvert class action proceedings through mandatory individual arbitration is in irreconcilable conflict with TILA. Since petitioner is using its arbitration clause to compel individual arbitration, the clause is unenforceable as applied to respondent's Truth In Lending Act claim.

### B. The claims of the proposed plaintiff class cannot be ordered to arbitration because arbitrators do not have authority to bind absent class members to their judgments.

Respondent filed this suit seeking certification of a nationwide class of home mortgage borrowers attempting to vindicate their claims under the Truth In Lending Act. Petitioner has invoked its arbitration clause to preclude respondent from resorting to TILA's class action remedies without addressing the question of whether the nationwide class could pursue its claims for class-wide relief in arbitration. The District Court answered this question in the negative after summarily concluding that class actions are merely procedural devices under TILA. *Randolph v. Green Tree Financial Corp.*, 991 F. Supp. 1410, 1423-24 (M.D. Ala. 1997). Respondent argues that the absence of an explicit class action provision in petitioner's arbitration clause precludes mandatory arbitration

of individual claims. We agree. But respondent also argues that, if there were such a provision, the TILA claims of a nationwide class could be resolved through mandatory arbitration. We disagree because an arbitral resolution of the claims of a plaintiff class cannot have preclusive effect on absent class members since arbitrators have no authority to bind absent parties.

This Court held in *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that an absent plaintiff class member's cause of action for money damages is a constitutionally protected property interest which entitles the absentee to due process guarantees before an adverse judgment of a court of law may permanently extinguish the claim through *res judicata*. *Id.* at 807, 811; *see also Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it"); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989). Due process protections for absent plaintiff class members include the right to notice of the pending disposition of the cause of action, the opportunity to be heard and participate in the pending proceedings, the opportunity to opt out of the class, and the right to adequate representation by the named plaintiff at all times during the proceedings. *Shutts*, 472 U.S. at 812; *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2315 (1999). The determination as to whether, for example, the notice provided to absent class members was the best practicable to afford them the opportunity to present objections, *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15 (1950), or whether the named plaintiffs adequately represent the absent parties, *Hansberry*, 311 U.S. at 42-43, must be made by the state, which alone has constitutional authority to extinguish a claim of a non-party. Otherwise, a property right would be extinguished without due process.

An arbitrator's decision has no preclusive effect as to constitutional questions relating to the arbitration proceeding. In *McDonald v. City of West Branch*, 466 U.S. 284 (1984), this Court unanimously held that a federal court hearing a Section 1983 claim could not give preclusive effect to a prior arbitration award. *Id.* at 292. The plaintiff in *McDonald* first arbitrated and lost a wrongful discharge claim under a collective bargaining agreement, then asserted in his Section 1983 suit that his city government employer violated his First Amendment rights by firing him in retaliation for his engagement in protected speech and petitioning activity. *Id.* at 285-86. The *McDonald* Court held that the unappealed arbitration decision did not preclude the plaintiff from litigating his First Amendment claim because the Full Faith and Credit Act, 28 U.S.C.§ 1738, applies only to judicial proceedings, not to unappealed arbitration awards, and because judicial preclusion rules apply only to claims that are enforceable through courts, not private dispute resolution systems. *Id.* at 288-89. In so holding, the Court explained that:

> Although arbitration is well suited to resolving contractual disputes, our decisions in *Barrentine* and *Gardner-Denver* compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights...
>
> ...An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in § 1983 actions.

*Id.* at 290. The disposition of the legal claims of a nationwide class would necessarily involve due process determinations that similarly exceed the authority and competence of a private arbitrator.

Beyond the issue of an arbitrator's power to bind anyone who has not consented to the specific proceeding, it would be an enormous stretch to apply the Federal Arbitration Act to compel arbitration of a class action, especially in light of the Act's history discussed above. For example, the determination of whether absent plaintiffs' interests are adequately represented involves complex legal questions that an arbitrator presiding over a class action would have to decide. Adequate representation by named plaintiffs requires an alignment of interests between the named and absent parties, identification of conflicting interests within the class and separate representation of such interests, and an allocation of recovered resources that is responsive to the differing interests of any subclasses. *See Ortiz*, 527 U.S. at 854-58; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d 768, 801 (3d Cir. 1995). The arbitrator would also have to ensure that absent class members have been adequately represented by counsel. This would require the arbitrator to examine the timing and terms of any disposition, differentiate counsel's interest in maximizing hourly fees from the party's interest in a just recovery, and search for evidence of collusion between defendants and plaintiffs' counsel against the interests of some or all of the class. *Id.* at 802-03. Such complex legal determinations, which are grounded in due process standards, not the law of the marketplace, far exceed the competency and authority of private arbitrators and bear no resemblance to the kind of business to business arbitration that those who drafted the FAA envisioned.

Finally, arbitral resolutions of these complex legal questions pertaining to the rights of absent class members would almost certainly be beyond review of any court. In contrast to the searching appellate review which *Amchem* and *Ortiz* illustrate to have been so vital in protecting absent class members from the pressures that named parties may exert on decision-makers, judicial review of the merits of arbitral determinations under Section 10 of the FAA is exceedingly deferential and would necessarily sacrifice this protection. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (court will set aside merits of arbitrable decisions "only in very unusual circumstances" such as fraud, corruption, or manifest disregard of the law); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) (to modify an arbitral award on the merits, court must find that "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case"). The FAA's failure to provide meaningful judicial review of arbitral determinations further shows why the Act was never intended to apply to class-based claims.

In attempting to compel individual arbitration under the Federal Arbitration Act, petitioner is effectively preventing consumers from enforcing the Truth In Lending Act's class action remedies for serial violations. To allow compelled arbitration in this situation would sever application of the FAA from the congressional purposes and policy goals that underpinned its enactment. The use of mandatory arbitration to preclude the award of class-wide relief would undermine the TILA's civil enforcement scheme by abrogating the Act's strongest deterrent penalty. Even if the parties attempted to arbitrate the claims of a TILA class, the proceeding would exceed the authority and competency of private arbitral decision-making far beyond anything ever contemplated, much

less ratified, by Congress in the Federal Arbitration Act, or permitted by the Due Process Clause as applied to absent class members.

## CONCLUSION

The decision of the court of appeals declaring petitioner's arbitration clause unenforceable should be affirmed.

Respectfully submitted,

ALAN B. MORRISON
(Counsel of Record)
PAUL LEVY
MICHAEL J. QUIRK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for *Amicus Curiae*
Public Citizen

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IN THE
**SUPREME COURT OF THE UNITED STATES**

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**GREEN TREE FINANCIAL CORP. -- ALABAMA and GREEN TREE FINANCIAL CORPORATION,**
*Petitioners,*

v.

**LARKETTA RANDOLPH,**
*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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# BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

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ELIZABETH RENUART
THE NATIONAL CONSUMER LAW CENTER
18 Tremont Street, #400
Boston, MA 02108
(617) 523-8010

Counsel for *Amicus Curiae*
THE NATIONAL CONSUMER LAW CENTER

STACY CANAN
JEAN CONSTANTINE-DAVIS
NINA F. SIMON*
DEBORAH ZUCKERMAN
AARP FOUNDATION LITIGATION

MICHAEL R. SCHUSTER
AARP

601 E Street NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP
*Counsel of Record

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No. 99-1235

IN THE

# Supreme Court of the United States

**GREEN TREE FINANCIAL CORP. -- ALABAMA and GREEN TREE FINANCIAL CORPORATION,**
*Petitioners,*

v.

**LARKETTA RANDOLPH,**
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICI CURIAE*[1]

AARP is dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization serving older Americans, AARP is alarmed by the rampant fraud and deceptive practices perpetrated in a broad range of marketplace transactions, because these acts

[1] The parties' consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* AARP and the National Consumer Law Center state that no counsel for any party authored this brief in whole or in part and that no party or entity other than these *amici curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief.

disproportionately affect older consumers. AARP supports laws and public policies designed to protect their rights and to preserve the legal means to enforce them. AARP played an active role in the passage of recent amendments to the Truth in Lending Act ("TILA"), and participated in negotiations with industry and government representatives to improve disclosures and enhance substantive protections against abusive lending practices. AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

In recent years, AARP Foundation attorneys have represented countless older homeowners who have been victimized by abusive mortgage refinancings. These cases challenged: lender compliance with TILA disclosure obligations, including hiding a sixteen-point broker fee; charging a premium for credit life insurance of no value to the consumer; failing to provide the homeowner with a Notice of Right to Cancel; and failing to provide the three-day advance warning disclosure to a borrower with a high cost loan. Each of these loans was destined to go into default because the borrowers' mortgage payments ranged from 52 to 100 percent of their monthly incomes. The abusive lending practices described above are not diminishing but are becoming more widespread.

The effect of an arbitration agreement such as Green Tree's on these cases would have been devastating to the borrowers' ability to vindicate their TILA rights. Regardless of the fact that their arbitration costs ultimately might have been reimbursed, the initial outlay of fees would have barred these claimants from seeking redress.

The National Consumer Law Center ("NCLC") is a non-profit corporation established in 1969. One of its primary objectives is the provision of assistance to legal services attorneys, governmental agencies, and private attorneys in advancing the interests of their low-income and elderly clients in the area of consumer law. NCLC staff write and publish over thirteen legal treatises on various federal and state statutes that affect consumer law. In particular, *Truth In Lending* (4th

ed. 1999) and its earlier editions have provided insight and analysis of TILA for over two decades. This text was most recently relied upon by Chief Judge Posner in *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 935 (7th Cir. 1999). For over twenty years, NCLC staff have provided oral and written testimony to Congress and the Federal Reserve Board on the propriety of statutory and regulatory changes to TILA and Regulation Z. NCLC staff also have been members of the Federal Reserve Board's Consumer Advisory Council.

*Amici* are filing this brief because mandatory arbitration agreements, such as Green Tree's, conflict with the public purpose of TILA and its private enforcement mechanism.

## SUMMARY OF ARGUMENT

An arbitration clause that is silent regarding payment of arbitration fees and costs undermines the Congressional purpose of the Truth in Lending Act ("TILA"), if it imposes fee barriers that prevent claimants from vindicating their statutory rights. While companies that impose binding arbitration frequently tout it as a low-cost alternative to litigation, arbitration can be prohibitively expensive. When arbitration prevents a claimant from vindicating statutory rights conferred by a public interest statute like TILA, it impermissibly conflicts with TILA and its Congressional purpose.

Congress enacted TILA to provide consumers with information about the essential terms of their credit transactions and to deter deception and fraud in the credit marketplace. It has been a cornerstone of federal consumer protection law since its passage in 1968. TILA relies upon consumers acting as private attorneys general to police creditor compliance by providing individual and class remedies. The enforcement of TILA through damages provisions is made feasible by the Act's fee-shifting provision, which mandates the award of costs and reasonable attorneys' fees to a prevailing consumer.

The class action remedy is an essential component to enforcing TILA's protections and is a powerful deterrent to wrongful conduct. Indeed, class actions remain the only

realistic way for consumers with small monetary claims to vindicate their rights under, and to promote compliance with, TILA. Without class relief and mandatory fee-shifting, TILA would be reduced to nothing more than a mere nuisance to creditors, thus diminishing the Act's deterrent and remedial functions.

The Court has held that parties in arbitration are entitled to all substantive rights guaranteed by a statute such as TILA. The Eleventh Circuit's conclusion that an arbitration clause that imposes steep arbitrator or filing fees violates TILA's fee-shifting mandate is consistent with the Court's holdings and should be upheld.

## ARGUMENT

### I. CONGRESS ENACTED THE TRUTH IN LENDING ACT TO REGULATE CREDIT INDUSTRY PRACTICES AND PROTECT CONSUMERS.

The Truth in Lending Act [2] ("TILA" or "Act") has been a cornerstone of federal consumer protection law since its passage in 1968. TILA was enacted in response to the growing complexity in consumer credit in which many consumers were unable to discover the essential terms of their credit transactions, and in recognition that many unwitting consumers were routinely victimized by misrepresentations and fraudulent practices in the credit marketplace.[3]

Prior to 1968, consumers had no easy way to determine how much credit would cost or how to compare various loan products. Creditors did not calculate or advertise interest in a uniform way, nor was there a single system for defining what additional charges would be included in the interest rate. These

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[2] 15 U.S.C. § 1601 *et seq.*

[3] *See* H.R. Rep. No. 90-1040, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962; *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181-82 (11th Cir. 1982).

differences in computation significantly affected the cost to the consumer. For example, a three-year $6,000 car loan at 6% interest cost the consumer: $1,080 in interest if computed as an add-on rate; $1,317 in interest computed at a discount rate; and $570 in interest at a simple or actuarial rate. Consumers confronted with seemingly similar interest charges simply had no way to decipher which quoted rate of interest was the most expensive and could not compare terms and shop for credit.[4/]

Congress responded to this marketplace confusion, and sometimes outright deception, by enacting TILA. The statute represented an effort by Congress to strengthen competition among financial institutions and enhance the economic stabilization of the marketplace by the informed use of credit.[5/] This overarching public purpose was furthered by mandating the accurate, uniform, and meaningful disclosure of the costs of consumer credit.[6/]

The Act took a major step toward eliminating the interest rate deception noted above by prescribing a uniform calculation of interest as an annualized rate, by defining what kinds of credit-related charges should be included when calculating the annual percentage rate ("APR"),[7/] and by requiring that the total cost of these charges be disclosed as a dollar amount in the "finance charge."[8/] In Ms. Randolph's case, the creditor included a vendor's single interest insurance premium in the amount financed which should have been, but was not, included in the finance charge. This had the effect of artificially lowering the APR, making the loan look more

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[4/] *See* 109 Cong. Rec. 2027 (1963) (statement of Sen. Douglas).

[5/] 15 U.S.C. § 1601(a).

[6/] *Id.*; *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377 (1973).

[7/] 15 U.S.C. § 1606.

[8/] 15 U.S.C. §§ 1605, 1638.

attractive to Ms. Randolph than it actually was.

TILA confers statutorily-created private rights affecting the public interest,[9] creates a system of disclosure that improves the bargaining posture of all borrowers, and requires strict technical compliance.[10] Green Tree violated TILA's mandatory disclosure scheme by failing to accurately provide Ms. Randolph with the essential terms of her credit transaction.[11] TILA's enforcement mechanism was designed precisely to empower consumers like Ms. Randolph to challenge creditors' wrongful conduct. Because of the importance of its remedial purpose, courts throughout the country have liberally construed TILA in favor of borrowers.[12]

### A. TILA's Text, Purpose, and Legislative History Reflect the Pivotal Role of Private Attorney General Enforcement.

Congress intended that TILA's protections be enforced by consumers acting as private attorneys general.[13] Simply

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[9] *See Parker*, 673 F.2d at 1181; *Mills v. Home Equity Group, Inc.*, 871 F. Supp. 1482, 1486 (D.D.C. 1994).

[10] *See Parker*, 673 F.2d at 1181; *Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980).

[11] *See* 15 U.S.C. §§ 1631(a), 1637-39; Regulation Z, 12 C.F.R. § 226.18 (1997). *See also In re Underwood*, 66 B.R. 656, 660 (Bankr. W.D. Va. 1986).

[12] *See Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3d Cir. 1998); *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir. 1995); *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 (11th Cir. 1994); *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986); *Bizier v. Globe Fin. Servs., Inc.*, 654 F.2d 1, 3 (1st Cir. 1981).

[13] *See Edwards v. Your Credit, Inc.*, 148 F.3d 427 (5th Cir. 1998); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); *Aquino v.*

(continued...)

legislating required disclosures could not, by itself, compensate for the vast disparity in bargaining positions between consumers and lenders. The Act protects all consumers by deterring improper and deceptive behavior by all creditors.[14]

This private attorney general scheme includes the right to obtain actual damages, individual statutory damages, enhanced statutory damages for high-cost mortgages, class action damages, rescission, and an award of costs and attorneys' fees.[15] TILA represents a carefully constructed balance between the borrower's right to receive accurate and timely information about the cost of credit and the creditor's obligation to provide those disclosures without significant liability for small disclosure errors.[16] Petitioners and their *amici* advocate upsetting this statutory balance by allowing creditors to impose an arbitration scheme that thwarts consumers' ability to vindicate their rights as prescribed by TILA.

### 1. TILA Damages Effectuate Private Attorney General Enforcement.

From the outset, Congress primarily focused on the enforcement of the public interest in accurate disclosure through private attorney general lawsuits seeking statutory

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[13] (...continued)
*Public Fin. Consumer Discount Co.*, 606 F. Supp. 504, 508 (E.D. Pa. 1985); *French v. Wilson*, 446 F. Supp. 216 (D.R.I. 1978).

[14] *See Edwards*, 148 F.3d at 432; *Jenkins v. Landmark Mortgage Corp.*, 696 F. Supp. 1089, 1092 (W.D. Va. 1988); *French*, 446 F. Supp. at 220.

[15] *See* 15 U.S.C. §§ 1640(a), 1635.

[16] *See* 15 U.S.C. § 1605(f).

damages.[17] Over the years, courts have uniformly held that TILA is primarily enforced through these private attorney general lawsuits which are expressly fostered by the statutory damages, mandatory attorneys' fees and cost shifting provisions.[18]

Several aspects of these provisions are significant. First, damages are mandatory even for technical violations. Second, to obtain statutory damages, the consumer need not show that he or she was deceived by the violation or suffered any actual damages;[19] this evidences the Congressional goal of furthering the public purpose of the Act through private enforcement. Finally, the consumer need not exhaust any administrative remedies or provide advance notice to a creditor or agency before instituting a lawsuit.

In the thirty two years since the Act's passage, Congress has consistently reaffirmed its commitment that private attorney general enforcement is critical to creditor compliance with the Act. In 1974, Congress specifically endorsed class actions by adopting class statutory damages[20] and added an actual

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[17] Actual damages were not included in the original damages provision. Consumer Credit Protection Act., Pub. L. No. 90-321, § 130, 82 Stat. 146 (1968) (*codified as amended in* 15 U.S.C. § 1640).

[18] *See Begala v. PNC Bank*, 163 F.3d 948, 950 (6th Cir. 1998); *Ramadan*, 156 F.3d at 502; *Edwards*, 148 F.3d at 432; *Rodash*, 16 F.3d at 1144; *Herrara v. First Northern Sav. & Loan Ass'n*, 805 F.2d 896, 902 (10th Cir. 1986); *Bizier*, 654 F.2d at 2.

[19] *See Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982); *Smith*, 614 F.2d at 968; *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3d Cir. 1979).

[20] Act of Oct. 28, 1974, Pub. L. No. 93-495, 88 Stat. 1500 (*codified as amended at* 15 U.S.C.§ 1640(a)(2)(B)).

damages subsection.[21] In 1988, Congress imposed statutory damages for failing to provide consumers important information about home equity lines of credit.[22]

In 1994, Congress sought to curtail the rampant growth of predatory mortgage lending targeted at vulnerable consumers by offering special protections on "high cost" loans.[23] Congress deemed the new "high cost" disclosures and protections so important that it expanded the private attorney general scheme by creating mandatory enhanced statutory damages.[24] Finally, in 1995 Congress rejected industry efforts to undermine class actions, and doubled individual statutory damages in mortgage transactions.[25]

### 2. TILA's Fee-shifting Provisions Effectuate Private Attorney General Enforcement.

The mandatory award of costs and attorneys' fees to a prevailing borrower is one of the lynchpins of TILA's statutory enforcement. Fee-shifting gives an aggrieved borrower not only the right, but the ability, to act as a private attorney general.[26]

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[21] *Id.* at § 407(a) (*codified as amended* at 15 U.S.C. § 1640(a)(1)).

[22] Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (*codified as amended at* 15 U.S.C. § 1637a).

[23] 15 U.S.C. §§ 1602(aa), 1639.

[24] Enhanced damages under The Home Ownership Equity Protection Act ("HOEPA") are in addition to other statutory and actual damages. 15 U.S.C. §§ 1640(a), 1640(a)(4).

[25] Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (*codified as amended at* 15 U.S.C. § 1640(a)).

[26] *See McGowan*, 569 F.2d at 848.

The consumer can afford to contemplate acting as a private attorney general because, if successful, costs and reasonable attorneys' fees must be awarded regardless of the size of the statutory damages recovery.[27] In contrast, unsuccessful plaintiffs are not penalized with an assessment of attorneys' fees and costs.[28] As Justice O'Connor observed, private attorney general actions "ensure the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available." *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (concurring). "Success must be measured not only in the amount of money damages but also in terms of the significance of the legal issues . . . and the public purpose served by the litigation." *Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d at 1165. Under TILA's fee-shifting statutory scheme, the enforcement costs that might otherwise be borne by a government bureaucracy are instead imposed on the creditor which has acted improperly.[29]

### 3. TILA's Class Action Provision Effectuates Private Attorney General Enforcement.

Congress consistently has recognized that class actions are essential to TILA's self-enforcement scheme. The debate over the importance of class actions emerged almost immediately after passage of this landmark consumer credit legislation. In the early years of TILA litigation, most courts were unwilling to certify a class because of the massive potential liability that would have resulted from aggregating the mandatory minimum

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[27] *See, e.g., Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d 1164 (7th Cir. 1997).

[28] *See* 15 U.S.C. § 1640(a)(3).

[29] *See, e.g., Kessler v. Associates Fin. Servs. Co.*, 639 F.2d 498 (9th Cir. 1981); *Harris v. Tower Loan, Inc.*, 609 F.2d 120 (5th Cir. 1980).

$100 statutory damages for all class members.[30] The inflexibility of minimum statutory damages, coupled with the Act's silence regarding class actions, created uncertainty as to Congress's intent regarding the use of class actions. As a result, courts imposed numerous procedural restrictions to prevent class liability for TILA violations.[31]

In its Annual Reports to Congress, the Federal Reserve Board expressed concern about the trend to disapprove TILA class actions.[32] The Board stated that "if this trend were to continue, the deterrent of potential class action liability which helps to ensure creditor compliance with the Act would be effectively lost."[33] The Board focused on the "prophylactic effect of the threat of class action exposure [which] elevates a possible Truth in Lending law suit from the ineffective 'nuisance' category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance."[34] Congress agreed that "'potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide

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[30] *See* Ralph I. Rohner and Fred H. Miller, *Truth in Lending* 865-6 (Robert A. Cook, et al. eds., 2d ed. 2000).

[31] *Id.* at 866. *See, e.g., Shields v. First Nat'l Bank*, 56 F.R.D. 442, 446 (D. Ariz. 1972); *Wilcox v. Commerce Bank*, 55 F.R.D. 134, 138 (D. Kan. 1972); *Rogers v. Coburn Fin. Corp.*, 54 F.R.D. 417, 419 (N.D. Ga. 1972); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *see also Johnson v. Tele-Cash*, 82 F. Supp. 2d 264, 269 (D. Del. 1999).

[32] *See* 1972 F.R.B. Ann. Rep. on Truth in Lending 13-14; 1973 F.R.B. Ann. Rep. on Truth in Lending 9.

[33] 1973 F.R.B. Ann. Rep. on Truth in Lending 9.

[34] 1972 F.R.B. Ann. Rep. on Truth in Lending 13-14.

adherence to uniform disclosure.'"[35] At the same time, Congress expressly rejected the finance industry's proposal that TILA class actions be limited to those seeking actual damages or injunctive relief.[36]

Congress created a class action damages provision that carefully balanced TILA's purpose "to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy" with its concern that creditors not be subjected to enormous penalties for technical violations.[37] This provision specifically authorized class actions but limited the maximum damages awards. Far from indicating Congressional disapproval of the class action remedy, the limitation on statutory damages was the only mechanism that Congress deemed viable to express its manifest intent to *promote* class actions.[38] Indeed, through numerous amendments to TILA over the years, Congress has never deviated from this position.

Class actions have and continue to be a critical element in the enforcement of TILA. The right to aggregate claims for statutory damages has proven a potent ally to government efforts to prevent lenders from overstepping the bounds of

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[35] *See* S. Rep. No. 93-278, at 15 (1973), *quoting* 1972 F.R.B. Ann. Rep. on Truth in Lending 13.

[36] *Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong. 188 (1973) (statement of Robert Norris, General Counsel, National Consumer Finance Association).

[37] S. Rep. No. 93-278 to accompany S. 2101, Truth in Lending Act Amendments 14-15 (June 28, 1973).

[38] *See* S. Rep. No. 94-590 at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431. (When Congress amended the class action provision to increase available damages, it "wishe[d] to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device.") *See also Johnson*, 82 F. Supp. 2d at 269.

TILA and straying into deceptive practices. In recent years, the payday loan industry has aggressively expanded from small local businesses to major national financial organizations.[39] These companies, whose loans are characterized by exorbitant rates, ranging from 261% to 782%,[40] adamantly had refused to provide TILA disclosures that would have revealed to borrowers their astronomical rates of interest.[41] Characterizing these transactions as "deferred presentments" or "cash leasing," these banks and finance companies sought to disguise the true nature of payday loans, asserting that TILA disclosures were unnecessary. Class action lawsuits propelled this issue to the foreground[42] and ultimately resulted in the Federal Reserve Board's issuing new Commentary[43] that stated the obvious – payday loans are consumer credit transactions and consumers

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[39] *See* Jean Ann Fox, Consumer Fed'n of Am., *The Growth of Legal Loan Sharking: A Report on the Payday Loan Industry* 2-3 (1998); Jean Ann Fox, Consumer Fed'n of Am., *Safe Harbor for Usury: Recent Developments in Payday Lending* 4 (1999), www.consumerfed.org.

[40] Jean Ann Fox, *The Growth of Legal Loan Sharking*, *supra*, at 7; *see also Hamilton v. York d/b/a/HLT Check Exchange*, 987 F. Supp. 953 (E.D. Ky . 1997); *In re Miller*, 215 B.R. 970 (Bankr. S.D. Ky. 1997).

[41] *See, e.g., Turner v. E-Z Check Cashing*, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999); *Hamilton*, 987 F. Supp. 953.

[42] *See, e.g., White v. Cash Emporium*, CA No. 98-269 (E.D. Ky. 1998); *Dortman v. Cash, Inc.*, CA No. 96-CV-188(R) (W.D. Ky. 1996); *Mumford v. McKenzie Check Advance*, Z-220-96 (Cir. Ct. Knox Cty., Tenn. 1996); *Goins v. Creditcorp*, V-96-175 (Cir. Ct. Bradley Cty., Tenn. 1996); *see also Johnson*, 82 F. Supp. 2d at 264.

[43] *Official Staff Commentary on Regulation Z § 226.2(a)(14)-2*, 65 Fed. Reg. 17129, 17130 (2000). The Board clearly stated that this commentary was not a change in the law.

are entitled to TILA disclosures that inform them of the true cost of that very expensive form of credit.[44/]

The public enforcement purpose of the class action remedy has been apparent from the outset. The class representative under TILA, who shepherds a case through complex litigation while receiving a smaller damages amount than in an individual case,[45/] cannot be said to be acting other than in the public's interest. Consistent with this notion, many TILA class action lawsuits effectively have raised and challenged abusive industry practices such as charging consumers for a deceptive insurance product,[46/] manipulating TILA disclosures to hide credit costs instead of disclosing them,[47/] and burying grossly inflated charges in the price of the goods sold.[48/] In the absence of class action lawsuits, many of these abusive practices would continue unabated.

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[44/] Similarly in the arena of automobile "title pawn" loans, consumer lawsuits highlighted that industry's unwillingness to comply with TILA's disclosure scheme. *See, e.g., Barlow v. Quik Pawn Shop*, 992 F. Supp. 1299 (M.D. Ala. 1997); *In re Lannice Fryer*, 183 B.R. 322 (Bankr. S.D. Ga. 1995). The Federal Reserve Board amended its Commentary to emphasize that pawns loans are consumer credit transactions under TILA. *Official Staff Commentary on Regulation Z § 226.17(c)(1)-18*, 61 Fed. Reg.14956 (1996).

[45/] *See Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121 (D. Haw. 1976).

[46/] *See Adams v. Plaza Fin. Co.*, 168 F.3d 932 (7th Cir. 1999); *Edwards*, 148 F.3d 427.

[47/] *See Minnesota v. First Alliance Mortgage Co.*, C9-98-11416 (Dist. Ct., 2d Judicial Dist. Minn. Mar. 10, 1999) (order for final judgment); www.ag.state.mn.us.

[48/] *See Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000); *Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927 (7th Cir. 1998).

## II. ARBITRATION AGREEMENTS SUCH AS GREEN TREE'S THAT PREVENT CONSUMERS FROM EFFECTIVELY VINDICATING THEIR STATUTORY RIGHTS UNDERMINE THE TRUTH IN LENDING ACT'S REMEDIAL PURPOSE.

The Court has recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congressional intent that a statute not be subject to a waiver of the right to a judicial forum can be gleaned from a statute's text or its legislative history, or from "an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Following this Court's direction, several federal courts have found arbitration provisions unenforceable when they undermined important statutory rights.[49/]

### A. Arbitration Contracts That Require Claimants to Pay Fees Undermine TILA Enforcement.

An arbitration clause, like the one in the instant case, that is silent regarding payment of arbitration fees and costs undermines the Congressional purpose of TILA if it imposes fee barriers that prevent claimants from vindicating their statutory rights. While companies that impose binding arbitration frequently cite it as a low-cost alternative to litigation, many courts have recognized the real costs of

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[49/] *See, e.g., Shankle v. B-G Maintenance Management, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Baron v. Best Buy Co., Inc.*, 75 F. Supp. 2d 1368, 1370-71 (S.D. Fla. 1999), *appeal stayed*, No. 99-14028-E (11th Cir. June 2, 2000). *Cf. Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484-85 (D.C. Cir. 1997).

arbitration and how the imposition of those costs and fees can prevent claimants from vindicating rights under statutes protecting public interests.

*Cole v. Burns International Security Services*, 105 F.3d 1465, 1480 (D.C. Cir. 1997), involved an arbitration agreement like Green Tree's which was silent as to costs. The parties in that Title VII civil rights case stipulated that arbitrators' fees are commonly $500 to $1,000 per day. The court found that an employee facing expensive filing and administrative fees, which are substantially in excess of the fees paid in federal court, is unlikely to pursue his or her statutory claims in an arbitral forum. *Id.* at 1484. In fact, the Court was:

> unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

*Id.* (footnotes & citations omitted). To effectuate the liberal policy favoring arbitration agreements without impairing the claimant's statutory rights, the D.C. Circuit Court interpreted the arbitration agreement to require the employer to bear the full expense of the arbitral fees and costs. *Id.* at 1485.

The Tenth Circuit confronted a similar, but more intractable problem in *Shankle v. B-G Maintenance Management, Inc.*, 163 F.3d 1230 (10th Cir. 1999), where it found that an arbitration agreement requiring an employee to pay half of an arbitrator's fees, which included a $6,000 deposit, $250 per hour of arbitrator time, $125 per hour for arbitrator travel time, and $45 per hour for paralegal time, placed him:

> between the proverbial rock and a hard place – it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. . . . B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws.

*Id.* at 1235. Because the fee-splitting provisions of the arbitration agreement explicitly conflicted with the statutory fee-shifting provisions, the *Shankle* court, unlike the court in *Cole*, was unable to craft a saving interpretation.

High up-front costs[50] create a formidable barrier to a consumer's ability to vindicate statutory rights. These costs present a particular problem for the many consumers whose relatively small claims are substantially less than the cost of proceeding to arbitration. For this reason, arbitration clauses that are silent as to fees and costs should be unenforceable *unless* such clauses are interpreted to "ensure that [a consumer's] ability to vindicate her statutory rights [under TILA] will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999). In the

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[50] For example, the American Arbitration Association (AAA) requires that claimants who request an in-person hearing for a small claim pay all fees and costs. In disputes valued at between $10,000 and $100,000, a consumer must pay a filing fee of $500 to $1,250, a daily hearing fee of $150, a daily room rental fee of $150, and a portion of the arbitrator's fee of $100 to $350 per hour. AAA, *Commercial Dispute Resolution Procedures* (visited July 20, 2000) <http://www.adr.org/rules/commercial/commercial_rules.html>. *See also* John Vail, *Defeating Mandatory Arbitration Clauses*, 36 Trial 70, 71 (Jan. 2000); *Cole*, 105 F.3d at 1484 n.13.

absence of such a ruling from this Court, the Eleventh Circuit was not persuaded by Green Tree's statement at oral argument that the arbitration award might ultimately apportion the fees as directed by TILA. There is "no guarantee that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order, despite the small sum that is likely to be the object of the dispute in arbitrations of this kind." *Id.* Moreover, even an allocation of fees in accordance with TILA at the *end* of arbitration does not remove the entry barriers which ensue when a claimant must *advance* costs as a condition precedent to initiating the case.

Allowing Petitioners to impose such costs on consumers renders null the Court's statement in *Gilmer* that arbitration must not effect a loss of the "'substantive rights afforded by the statute. . . .'" 500 U.S. at 26 (*quoting Mitsubishi*, 473 U.S. at 614). In *Gilmer*, the standard practice was for employers to pay all the arbitration costs and fees under the NYSE and NASD rules.[21] The Court, therefore, was not confronted with the chilling effect upon a complainant being forced into an unreasonably expensive arbitration proceeding.

Petitioners and their *amici* simply dodge this issue. They fail to acknowledge the hardship – indeed the impossibility – for the average consumer to advance the fees that often far exceed the amount of the claim. Instead, they fast-forward the discussion down the time line and postulate a rosy scenario for the successful borrower in arbitration. They incorrectly argue that the right to costs and attorneys' fees is assured by the language of the arbitration agreement that " the arbitrator shall have all powers provided by the law and the Contract." *Randolph*, 178 F.3d at 1151. On the contrary, this language suggests that a great deal of discretion is accorded the arbitrator who need not follow the law. This slight of hand ignores the impact of up-front costs on borrowers. Arbitration that fails to clearly adopt the mandatory fee-shifting guarantees of TILA seriously undermines the statute's primary enforcement mechanism.

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[21] *See Cole*, 105 F.3d at 1483.

**B. Arbitration Contracts That Preclude Class Actions Undermine TILA Enforcement.**

The Court has endorsed the important role of class actions:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

*Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted).[52]

TILA claims often are brought for small dollar amounts, to remedy deceptive practices aimed at the most vulnerable members of our society. Class actions were designed for this very situation, cases brought by "impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant, one that . . . otherwise might get away with piecemeal highway robbery by committing small violations that were . . . beyond [the] ability or resources [of individual plaintiffs] to remedy." *Jackson v. Check' N Go, Inc.*, No. 99-C-7319, 2000 WL 782927, at *3 (N.D. Ill. June 13, 2000).

The class action remedy is not merely a procedural device; it is an important *substantive* right under TILA.

> Whether or not a class action is available as a remedy is a substantive issue relating to congressional intent. . . . It is hard to believe that

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[52] *Accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

> the question of whether TIL damages should be collected en masse is no more than a procedural issue.... Any uncertainty on this score should be resolved by the specific class action recovery provisions in section 130(a)(2) of the TIL Act.

Ralph I. Rohner and Fred H. Miller, *Truth in Lending* 871 (Robert A. Cook, et al. eds., 2d ed. 2000). As a substantive right under TILA, class actions must be available to consumers either in the judicial or arbitral forum.[53]

The TILA class action right is threatened by the interpretation of federal courts that have held that class arbitration may proceed only if specifically authorized by the agreement or its applicable rules.[54] Even when the agreement is silent on the issue, like the Green Tree agreement, federal courts have enforced the agreement but disallowed class arbitration[55] notwithstanding that enforcement may result in nullifying important statutory rights.[56] Failing to heed the

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[53] *Gilmer* is distinguishable because, unlike TILA, the ADEA imposes barriers to class actions. The ADEA allows only opt-in class actions preceded by 60-day notice to the EEOC. The EEOC then "shall promptly seek ... informal methods of conciliation, conference, and persuasion" and EEOC commencement of an action terminates the private class action. 29 U.S.C. §§ 626(b), (c), (d).

[54] *See Baesler v. Continental Grain Co.*, 900 F.2d 1193,1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (*per curiam*); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

[55] *See Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991).

[56] *See, e.g., McCarthy v. Providential Corp.*, No. C-94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994); *Gammaro v. Thorp Consumer*

(continued...)

Court's warning that parties to an arbitration agreement should not be forced to forgo substantive statutory rights and that "all statutory claims may not be appropriate for arbitration," *Gilmer*, 500 U.S. at 26, many courts have misconstrued the liberal federal policy favoring enforcement of arbitration agreements

Only a few federal courts, including the Eleventh Circuit in *Randolph*, have taken care to balance the federal policy favoring arbitration while upholding statutory integrity. In *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999), a putative class action alleging the failure to disclose excessively high interest rates, the court carefully reviewed TILA's legislative history and damages provisions when considering the enforceability of an arbitration agreement that prohibited class action relief. While mindful of the liberal policy favoring enforcement of arbitration agreements, the court appropriately found that the agreement "would contravene the express congressional intent to 'encourage the use of class actions as an important tool for enforcing Truth in Lending.'" *Id.* at 267, *quoting Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1120 (D. Haw. 1976). Without class relief, TILA would be stripped of its "sting" and reduced to nothing more than a mere nuisance to creditors, thus diminishing the Act's deterrent and remedial functions. *See Johnson*, 82 F.2d at 270.

The reluctance of many federal courts to recognize the key role of class actions in vindicating important statutory rights that affect the public interest will have a devastating effect upon consumers.[57] If consumers are forced into the arbitral forum

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[56] (...continued)
*Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993).

[57] Unlike some federal courts, many state courts have found that class action arbitration is allowed under the FAA. *See, e.g., Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd sub nom. on other grounds, Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998), *cert. denied*, 527 U.S.
(continued...)

without the right to seek class-wide relief, creditors will be able to avoid TILA compliance with impunity.[58]

### 1. Arbitration Is Not Suitable for Class-wide Adjudication.

Class-wide adjudication is not suitable for arbitration as long as the due process rights of absent class members are not protected. Unless arbitrators guarantee these rights and follow Fed. R. Civ. P. 23, claims under TILA and other statutes imbued with a public purpose cannot, consistent with the Constitution and Congressional intent, be forced into arbitration.

The representative nature of class actions creates particular due process concerns. Special steps must be taken to protect the interests of individuals who will be bound by the outcome of a suit to which they were not a party. These steps include notice, an opportunity to opt out, and assurance that the named plaintiff(s) adequately represent the interests of absent class members at all stages of the litigation. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 817, 846 (1999); *Phillips Petroleum v. Shutts Co.*, 472 U.S. 797, 811-12 (1985); *Eisen*, 417 U.S. at 173-74. Unless arbitrators can fulfill this role, class actions cannot be forced into arbitration.

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[57] (...continued)
1003 (1999); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 320-22 (Ct. App. 1986); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991).

[58] *See In re Knepp*, 229 B.R. 821, 842 ( Bankr. N.D. Ala. 1999) ("The pervasive use of arbitration agreements in consumer contracts could have the effect of eliminating class actions. If class actions are no longer an option, the vast majority of consumer claims involving relatively small sums of money on an individual basis will be left without a remedy.").

### 2. The Demise of Class Actions Would Create a Void In TILA Enforcement.

Petitioners' *amici* have asserted that regulatory enforcement of TILA eliminates the need for class actions. *See, e.g.*, Brief of the Chamber of Commerce of the U.S. at 18-19. These assurances simply do not ring true. The Federal Trade Commission ("FTC"), which has primary enforcement authority over many thousands of consumer finance companies,[59] such as Green Tree, has had few resources allocated for enforcement. As a result, its Division of Financial Practices was able to bring only twenty eight TILA cases between January 1998 and December 1999.[60]

The suggestion that the regulatory agencies are covering the field in enforcing TILA is contradicted by industry testimony before Congress. "First and foremost, these laws, and related regulations, need to be enforced more vigorously. Most abuses could be handled quite effectively by better enforcement."[61] Indeed, the one recommendation on which all industry representatives agreed was that greatly enhanced enforcement is needed, not new legislation.[62] In the face of this testimony,

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[59] 15 U.S.C. §§ 45(a), 1607.

[60] *See* App. 1: Jan. 15, 1999 and Jan. 6, 2000 letters from the Chairman of the FTC to the Director of the Federal Reserve Board's Division of Consumer and Community Affairs (signatures on originals).

[61] *Predatory Lending Practices in the Subprime Industry: Hearings before the House Comm. on Banking and Fin. Servs.* (May 24, 2000) [hereinafter *Predatory Lending Practices*] (testimony of Laura Borelli, Nat'l Home Equity Ass'n).

[62] *Predatory Lending Practices*, *supra* (testimony of Ralph Rohner, Consumer Bankers Ass'n; David Bochnowski, America's Community Bankers; Neill Fendly, National Ass'n of Mortgage Brokers).

the contention of *amici* that class actions are no longer necessary cannot be taken seriously.[63]

### C. Unwritten Arbitration Decisions Undermine TILA Enforcement.

TILA cases are intended to protect the public at large, focusing primarily on interpreting the Act and regulations, and only secondarily on the facts.[64] When, however, arbitration is conducted in private and written decisions are not required, it is difficult, if not impossible, to determine whether an aggrieved party's substantive rights have been upheld in the arbitral forum.[65]

"[P]ublished [TILA] case law is necessary to provide guidance to banks," and private, unpublished decisions "eliminate[ ] that source of guidance." Budnitz, *supra*, at 326.[66] The public resolution of cases involving laws that uphold the public's interest help to guide our society.[67] "[W]ritten opinions . . . apply necessarily vague positive law to concrete fact situations." Brunet, *supra*, at 20. The development of law "has a significant purpose to 'channel

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[63] State attorneys general enforcement authority under TILA is limited to redressing violations in connection with "high cost" mortgage loans. *See* 15 U.S.C. § 1640(e).

[64] *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, Ohio St. J. on Disp. Resol. 267, 325 (1995). *Cf.* Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardozo L. Rev. 481, 492 (1981).

[65] *See* Budnitz, *supra*, at 319.

[66] *See also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tul. L. Rev. 1, 17 (1987).

[67] *See* Brunet, *supra*, at 20.

behavior in such manner as to prevent or avoid conflict.'" *Id.* (citation omitted).

In *Gilmer*, the Court was not confronted with an arbitral forum that failed to provide written public decisions. 500 U.S. at 31-32. Unlike the Green Tree arbitration agreement, the *Gilmer* arbitration was to be conducted pursuant to the NYSE rules requiring that all arbitration awards be in writing, contain sufficient information describing the nature and resolution of the case, and be made public. *Id.* Moreover, the Court found that "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." *Id.* at 32.

*Gilmer* stands in sharp contrast to the present case where pre-dispute arbitration clauses have become commonplace in consumer transactions. "It is anticipated that virtually all major banks and lending institutions will implement consumer arbitration procedures within the next five years."[68] As a result, consumers are no longer able to avoid arbitration by taking their business elsewhere.[69]

The widespread use of consumer arbitration agreements could remove the judiciary's influence from entire industries or economic relationships.[70] The courts have been instrumental

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[68] Alan S. Kaplinsky & Mark J. Levin, *Excuse me, but who's the predator? Banks can use arbitration clauses as a defense*, 7 Bus. L. Today 24, 28 (May/June 1998).

[69] Senator Feingold stated that "consumer credit lenders are increasingly requiring their customers to use binding arbitration when a dispute arises. . . . [T]he practice is becoming so pervasive that consumers may soon no longer have an alternative, unless they forego use of a credit card or a consumer loan entirely." 146 Cong. Rec. S930, 933-34 (daily ed. Feb. 29, 2000) (statement of Sen. Feingold).

[70] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled*

(continued...)

in defining TILA provisions that serve to protect consumers and guide creditors. If the development of TILA law ceases, the purpose of TILA to provide uniform rules may also cease.

> A statute is a legislative policy choice, but without subsequent judicial development through the public resolution of disputes, that policy will remain stagnant, or perhaps wither entirely. . . . Even if initial principles are established through adjudication, permitting the arbitration of an entire category of claims restricts further evolution in that area of the law by reducing the number and variety of claims presented to the courts.

John V. O'Hara, *The New Jersey Alternative Procedure For Dispute Resolution Act: Vanguard of a 'Better Way'?*, 136 U. Pa. L. Rev. 1723, 1746 (1988). Indeed, arbitration resolution, without written public decisions, undermines the principle of *stare decisis*, which preserves our body of law. *Stare decisis* "promotes evenhanded, predictable and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). As Justice Powell noted, "*[S]tare decisis* is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior." Justice Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 286 (1990).

In order to preserve the public policy foundation of TILA and provide compliance guidance for creditors, arbitrators resolving cases must apply the statutory law and issue written opinions that are publicly available.

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[70] (...continued)
*Arbitration*, 1997 Wis. L. Rev. 33, 59 (1997).

### D. Green Tree's Arbitration Clause is Typical of Those Designed to Prevent Consumers From Acting as Private Attorneys General Under TILA.

The current trend of lenders and other businesses to impose binding arbitration on their customers in order to prevent litigation is indisputable.

> Consumers have been ganging up on banks. But now the institutions have found a way to defend themselves. . . . Arbitration is a powerful deterrent to class action lawsuits against lenders because the great weight of authority holds that arbitrations cannot be conducted on a class basis unless the parties have agreed to do so. . . . Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.

Kaplinsky & Levin, *supra*, at 24-26, 28.

Green Tree's success in adopting this approach to avoid legal consequences for its lending practices cannot be overlooked. Arbitration agreements have enabled Green Tree to avoid scrutiny of its alleged widespread deceptive practices in the financing of home improvement contracts and mobile home sales throughout the nation.[71] Having successfully forced many lawsuits into the arbitral forum, Green Tree is now actively seeking to deprive claimants of their substantive right to pursue these claims as class actions. Green Tree has

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[71] *See, e.g., Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (home improvement); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655 (S.D. Miss. 2000) (mobile home); *Green Tree Fin. Corp. v. Holt*, 171 F.R.D. 313 (N.D. Ala. 1997) (class mobile home); *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) (class mobile home).

vigorously opposed the prosecution of these claims through class arbitration.[72/]

Green Tree's use of the arbitral forum to compel consumers to "forego the substantive rights afforded by the statute" is in direct conflict with the Court's decisions in *Mitsubsishi*, 473 U.S. at 628, and *Gilmer*, 500 U.S. at 26. Green Tree's improper use of arbitration undermines the very essence of TILA's private attorney general scheme. Green Tree has, in effect, bypassed the legislative and judicial processes to alter the legal system to meet its own goals and to protect its "bottom line" regardless of – or precisely because of – the merits of numerous customers' claims. This behavior must not be countenanced by the Court.

## CONCLUSION

Consumers' statutory rights under TILA cannot be defeated through the mechanism of the arbitral forum. Consumers who are required to pursue their TILA claims in arbitration must be accorded their full rights and remedies under the statute, including fee-shifting and the pursuit of class claims, and protection of their due process rights in class arbitrations. As long as these rights, remedies, and protections are not afforded

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[72/] Subsequent to the Third Circuit's decision in *Harris*, 183 F.3d 173 (3d Cir. 1999), Green Tree has opposed allowing these arbitrations to proceed on a class-wide basis. There are no citations to these proceedings because arbitration is not public. *See also Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) (a class action proceeded to class arbitration over Green Tree's objection). *See* App. 2: Green Tree's Mem. Opp. to Class Arbitration (signature on originals).

under arbitration agreements, consumers must be permitted their day in court.

July 24, 2000

Respectfully submitted,

Elizabeth Renuart
The National Consumer
Law Center
18 Tremont Street
Boston, MA 02108
(617) 523-8010

Counsel for *Amicus Curiae*
The National Consumer
Law Center

Nina F. Simon*
Stacy Canan
Jean Constantine-Davis
Deborah Zuckerman
AARP Foundation
Litigation

Michael R. Schuster
AARP

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus*
*Curiae* AARP

*Counsel of Record

# APPENDIX 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

January 15, 1999

Dolores S. Smith, Director
Division of Consumer and Community Affairs
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

Dear Ms. Smith:

This letter responds to your request for information regarding the enforcement activities of the Federal Trade Commission under the Truth in Lending, Consumer Leasing, Equal Credit Opportunity, and Electronic Fund Transfer Acts ("Acts") during the past year for use in preparing the Federal Reserve Board's ("Board") Annual Report to Congress. You have asked for information regarding the Commission's enforcement activities pursuant to those Acts, including methods of enforcement and significant enforcement actions and the extent to which compliance is achieved by entities subject to the Commission's enforcement authority. Also, you have asked whether the Commission recommends any changes to these laws or their implementing regulations or wishes to provide any other comments or observations.

## I. A DESCRIPTION OF THE COMMISSION'S ENFORCEMENT ACTIVITIES UNDER THE ACTS DURING THE PAST YEAR

Truth in Lending Act and Consumer Leasing Act

Since January 1998 up to the present, the Commission filed a complaint in federal district court charging a Washington, D.C. mortgage lender and its owner, inter alia, with violating the Truth In Lending Act ("TILA") and Regulation Z and the Federal Trade Commission Act ("FTC Act"), in connection with alleged deceptive and unfair practices in home mortgage lending. The Commission also issued final decisions and orders in thirteen administrative cases concerning alleged deceptive lease and/or credit advertising in violation of the FTC Act, and failure to clearly and conspicuously disclose and/or failure to make available advertised lease and/or credit terms, in violation of the Consumer Leasing Act ("CLA") and Regulation M and/or the TILA and Regulation Z. The above cases are discussed below. Other investigations of possible TILA and/or CLA violations are ongoing.

In Federal Trade Commission v. Capital City Mortgage Corp. ("Capital City Mortgage"),[1/] the Commission filed a complaint in United States District Court for the District of Columbia against a Washington, D.C. area mortgage company and its owner, Thomas K. Nash, alleging numerous violations of federal laws, inter alia, the TILA and

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[1/] No. 98CV00237 (D.D.C. filed Jan. 29, 1998).

Regulation Z and the FTC Act.[2/] The complaint alleges that defendants' borrowers, in many instances, are minority and/or elderly persons living on fixed or low incomes and that defendants' loans include interest rates that generally ranged between 20-24 percent, for loans secured by home equity, and 9-12 percent, for purchase money loans. According to the complaint, in many instances, defendants' transactions involve interest-only balloon, rather than amortizing, loans. The complaint alleges, inter alia, that defendants, in many instances, violated the TILA and Regulation Z, and engaged in unfair or deceptive acts or practices in violation of the FTC Act, by: 1) understating the annual percentage rate and finance charge; 2) overstating the amount financed; 3) failing to disclose or accurately disclose the payment schedule or the total of payments (including but not limited to failing to disclose a balloon payment); 4) failing to provide disclosures before consummating the transaction and in the required format; 5) failing to provide disclosures that accurately reflect the legal obligation; and 6) failing to provide or correct certain "good faith"disclosures.

The complaint also alleges that defendants engaged in other deceptive or unfair practices in offering and extending credit and throughout the duration of the loans, in violation of the FTC Act, with the result that a number of borrowers were overcharged on their loans, were defaulted, and had title to their homes or other property impaired or completely lost (along with the equity). These alleged deceptive or unfair practices include: 1) representing a loan as an amortizing

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[2/] The complaint in this matter also alleges, inter alia, violations of the Equal Credit Opportunity Act. See infra p. 7.

loan when, in fact, it was an interest-only balloon loan; 2) representing that loan payments were higher than they should have been under the loan instruments by demanding that borrowers pay for services not provided, for charges imposed by the government or related entities on defendants prior to the borrowers' purchase of the property, and for no-insurance penalties when defendants were to provide the insurance or the borrower had timely purchased insurance; 3) collecting real estate tax escrow payments, failing to pay the taxes and representing that the taxes had been paid; 4) refusing to explain overcharges; 5) initiating foreclosure proceedings after nonpayment of overcharges and obtaining title by foreclosure or taking a deed in lieu thereof; 6) adding charges to arrears or loan principal and accruing compound interest and increasing the pay-off amount; 7) receiving sufficient pay-off amounts but refusing to release the lien without further payment; and 8) refusing to reinstate a borrower after the borrower paid the reinstatement fee.

The complaint asks the court to award, inter alia, the amount necessary to prevent unjust enrichment and consumer redress (including refunds of monies paid, disgorgement of ill-gotten gains, and rescission of contracts) and to permanently restrain defendants from future law violations. The case is now in the discovery phase; a trial date has not yet been set.[3/]

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[3/] The case has been joined, for purposes of discovery, with a private lawsuit, Hargraves v. Capital City Mortgage Corp., No. 98CV1021 (D.D.C. filed Apr. 24, 1998).

In Chrysler Corporation, Inc. ("Chrysler"),[4] Bozell Worldwide, Inc. ("Bozell"),[5] and Martin Advertising, Inc. ("Martin"),[6] the Commission issued final decisions and orders in three cases involving alleged deceptive lease and/or credit advertising in the automobile industry, in violation of the CLA and Regulation M and/or the TILA and Regulation M and the FTC Act. The complaints charged that Chrysler and Bozell, its national advertising agency, and Martin, a regional advertising agency for General Motors's dealerships and dealer associations, created and disseminated deceptive lease and/or credit advertisements that promoted various terms (including monthly payment amounts) and omitted key cost terms or buried this information in fine, and at times unreadable, print, in violation of the CLA and Regulation M and the FTC Act. Chrysler and Bozell also were charged with misrepresenting that the luxury vehicle model displayed in ads was available at the prominent, low lease terms, in violation of the FTC Act. In fact, according to the complaint, the low monthly payments applied to Chrysler models of lesser value than those featured in the ads, and information about lease inception fees and other terms appeared only in unreadable fine print and was not clear and conspicuous, in violation of the CLA and Regulation M and the FTC Act.

The complaint against Martin also alleges that the company violated the FTC Act, the CLA and Regulation M, and the TILA and Regulation Z regarding its automobile lease and credit advertising. The complaint charges that Martin's

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[4] FTC Docket No. C-3847 (Jan. 13, 1999).

[5] FTC Docket No. C-3845 (Jan. 13, 1999).

[6] FTC Docket No. C-3846 (Jan. 13, 1999).

television and radio lease ads were deceptive by: 1) misrepresenting that consumers could purchase a vehicle by paying low monthly payments, when, in fact, the offers involved leases and the ads omitted this fact or hid the information in fine print or rapidly-stated audio disclosures; 2) misrepresenting the amount consumers were required to pay at lease inception; and 3) omitting or hiding important information about lease inception fees in unreadable fine print or incomprehensible audio disclosures. The complaint also alleges that Martin's balloon payment credit ads were deceptive and falsely represented that consumers could buy a car by making only low monthly payments, inadequately disclosing the existence and amount of a final balloon payment, a substantial down payment, the annual percentage rate, or other terms of repayment. The complaint further alleges that Martin's lease and credit ads violated the CLA and Regulation M and TILA and Regulation Z by omitting required disclosures or making disclosures that were not clear and conspicuous and by failing to state a rate of finance charge as an annual percentage rate or "APR."

The orders with Chrysler, Bozell, and Martin prohibit misrepresentations of the total amount due at lease signing or delivery, the amount down and/or down payment, and the capitalized cost reduction or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required). The orders also prohibit the companies from stating any charge that is part of the total due at lease signing or delivery, or that no such charge is required (other than a statement of the periodic payment) more prominently than a statement of the total amount due at lease signing or delivery. The orders also prohibit the companies from stating the amount of any payment unless the ad also states, clearly and conspicuously, all of the terms required by the CLA and

Regulation M. In addition, the orders in Chrysler and Bozell prohibit these companies from misrepresenting the vehicle model available to consumers in connection with any advertised lease offer. In Martin, the order also prohibits the company from misrepresenting that any motor vehicle lease advertisement pertains to a cash or credit offer. This order also prohibits the company from misrepresenting the existence and amount of any balloon payment or the annual percentage rate. In addition, the order prohibits Martin from stating the monthly payment or other credit terms without, clearly and conspicuously, stating all of the terms required by the TILA and Regulation Z. Under all three orders, the disclosures required by the CLA or TILA for lease and/or credit advertising must be made "clearly and conspicuously"-- that is, in a manner that is readable (or audible) and understandable to a reasonable consumer.

In Grey Advertising, Inc. ("Grey"),[7/] Rubin Postaer and Associates, Inc. ("Rubin Postaer"),[8/] and Foote, Cone and Belding, Inc. ("FCB"),[9/] the Commission issued final decisions and orders with three national advertising agencies resolving charges that they violated the CLA and Regulation M and/or the TILA and Regulation Z and the FTC Act by misrepresenting, hiding, and failing to disclose adequately the true terms of their advertised automobile lease and credit deals. The orders settled charges that these companies developed and disseminated deceptive advertisements for "zero down," "penny down," or other low amounts due at

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[7/] FTC Docket No. 3793 (Apr. 6, 1998).

[8/] FTC Docket No. 3794 (Apr. 6, 1998).

[9/] FTC Docket No. 3792 (Apr. 6, 1998).

inception in lease advertisements for Mitsubishi Motor Sales of America, Inc., American Honda Motor Corporation, and Mazda Motor of America, Inc., respectively. In Grey, Rubin Postaer, and FCB, the Commission alleged that the lease ads misrepresented the true amounts that consumers were required to pay at inception and did not adequately provide material cost information necessary to prevent misleading consumers who had to pay significant fees. According to the allegations, the ads presented information about these additional fees only in unreadable print that appeared: 1) in type too small; 2) for too short a duration; 3) in quick "scrolling"text; 4) against moving or distracting backgrounds; and/or 5) in a location far removed from the more prominent representations. The complaint against Grey also alleged that this company created and disseminated deceptive automobile balloon payment credit advertisements. The Commission alleged that these credit ads misrepresented that consumers could buy a car by making low monthly payments and paying low amounts "down" and did not adequately disclose the existence and amount of a several thousand dollar final balloon payment, the APR, and other terms of repayment. Instead, as alleged, the credit ads placed this critical cost information in unreadable fine print disclosures.

Under all three final orders, the companies may not, inter alia, misrepresent in any motor vehicle lease advertisement the total amount due at lease signing or delivery, the amount down, and/or the down payment, the capitalized cost reduction, or any other amount that reduces the capitalized cost of the vehicle (or that no such amount is required). Also, any ad that highlights an amount "down" or mentions certain other amounts due at lease inception (or states that there is no such charge) would have to provide an equally prominent statement of the total amount due at lease

inception. The final order with Grey also, among other things, prohibits the company in any closed-end credit advertisement involving motor vehicles from misrepresenting the existence and amount of any balloon payment or the annual percentage rate.

In Toyota Motor Sales, U.S.A., Inc. ("Toyota"),[10/] Volkswagen of America, Inc. ("Volkswagen),[11/] Suntrup Ford., Inc. and Suntrup Buick-Pontiac-GMC Truck, Inc. ("Suntrup"),[12/] Lou Fusz Automotive Network, Inc. ("Lou Fusz"),[13/] Beuckman Ford, Inc. ("Beuckman"),[14/] and Frank Bommarito Oldsmobile, Inc. ("Bommarito"),[15/] the

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[10/] FTC Docket No. C-3776 (Jan. 5, 1998).

[11/] FTC Docket No. C-3778 (Jan. 5, 1998).

[12/] FTC Docket No. C-3779 (Jan. 5, 1998). As indicated above, the final decision and order covered two related companies: Suntrup Ford, Inc. and Suntrup Buick-Pontiac-GMC- Truck, Inc. A separate consent agreement was signed by each company, however. See Suntrup Ford, Inc., FTC File No. 952 3200 (Oct. 7, 1997), and Suntrup Buick-Pontiac-GMC Truck, Inc., FTC File No. 952 3201 (Oct. 7, 1997).

[13/] FTC Docket No. C-3780 (Jan. 5, 1998).

[14/] FTC Docket No. C-3777 (Jan. 5, 1998).

[15/] FTC Docket No. C-3774 (Jan. 5, 1998).

Commission issued final decisions and orders with two major automobile manufacturers and five St. Louis, Missouri-area dealerships and their Chief Executive Officers ("CEOs") pertaining to deceptive lease and/or credit advertisements. As reported on last year when the orders were accepted for public comment, these orders settled charges that the seven companies violated the CLA and Regulation M and/or the TILA and Regulation Z and the FTC Act by misrepresenting, hiding, or failing to adequately disclose the cost and terms of automobile lease and/or credit transactions. The orders in Toyota and Volkswagen prohibit misrepresentations of the total amount due at lease signing and require lease ads that state any charge that is part of the amount due at lease signing or that no such charge is required (excluding a statement of the periodic payment) to state with equal prominence the total amount due at lease signing. These manufacturers are also required to comply with all requirements of the CLA and Regulation M in lease ads. The orders in the St. Louis cases prohibit the dealerships and their CEOs from misrepresenting the costs of leasing, including the total amount due at lease signing. The orders also require compliance with all aspects of the CLA and Regulation M, including that mandatory triggered terms in advertisements be stated clearly and conspicuously. Also, the Lou Fusz order prohibits misrepresentations of the type of transaction advertised, including that the offer is for a one- payment lease. It enjoins Lou Fusz from advertising that a specific offer is available, unless the company usually and customarily offers to lease vehicles at the advertised terms. The Beuckman order would also prevent the company from stating the term "RCL" without stating clearly and conspicuously that this term refers to a lease. The Bommarito order also prohibits misrepresentations of the terms of financing a vehicle, including the amount of any balloon payment. In addition,

Bommarito is required to include the amount of any final balloon payment prominently, and in close proximity, to certain advertised credit terms. The orders with the St. Louis dealerships also prohibit violations of the TILA and Regulation Z.

The Commission continues to view consumer and business education efforts as important to its enforcement activities. In 1998, in view of increasing issues concerning possible home equity fraud, the Commission issued three consumer publications to provide additional information to consumers considering home equity loans and reverse mortgages: "Home Equity Loans: The Three-Day Cancellation Rule;" "Reverse Mortgages -- Cashing in on Home Ownership;" and "Home Equity Scams: Borrowers Beware."[16/] The Commission also issued a news release, "Northwest, Air Canada Airlines Customers with Canceled Tickets May Have Rights under Federal Credit Law," to assist consumers in using their rights under the Fair Credit Billing Act, an amendment to the TILA. The Commission staff also continued to participate in the Board-sponsored "Leasing Education Program Team," involving the Board, Commission staff, and a coalition of entities (including consumer groups, state attorneys general and industry representatives) now developing online and other forms of lease materials to enhance awareness and understanding of

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[16/] " These publications were also designed to assist consumers in Texas, where the state constitution was amended to allow companies to offer general home equity loans, starting in 1998, for the first time in that state's history. See, e.g., "FTC Release: FTC Education Effort Focuses on Home Equity Loan Fraud" (May 20, 1998).

leasing. All of the above consumer protection and business education materials were also made available to the public through the Commission's Website at "www.ftc.gov. "[17/]

## Equal Credit Opportunity Act

In 1998, the Commission filed a complaint in federal district court charging a Washington, D.C. area mortgage lender with, inter alia, violations of the Equal Credit Opportunity Act ("ECOA") and Regulation B and the FTC Act. This case is discussed below. Other enforcement efforts continue.

In January 1998, the Commission filed a complaint in United States District Court for the District of Columbia in Capital City Mortgage,[18/] alleging that this company and its owner, Thomas K. Nash, violated the ECOA and Regulation B and engaged in unfair or deceptive acts or practices in violation of the FTC Act, in numerous manners. These alleged ECOA violations included: 1) failing to take written applications for mortgage loans; 2) failing to collect required information about the race or national origin, sex, marital status, and age of applicants; 3) failing to provide applicants with written notice of adverse action; and 4) providing notice of adverse action, but failing to provide applicants with: a) the correct principal reason for the action taken or b) the correct name and address of the Federal Trade Commission, the

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[17/] " Information regarding the Commission's enforcement actions and other activities discussed in this report are also available at this Website.

[18/] See supra note 1.

federal agency that administers compliance with the ECOA with respect to Capital City and Nash. As indicated above, this case is now in the discovery phase, and it has been joined for discovery purposes with a private lawsuit.[19/] The Commission is seeking civil penalties and injunctive relief for the alleged violations of the ECOA and Regulation B and the FTC Act.

In May 1998, the Commission and other federal agencies submitted a joint comment to the Board about Regulation B.[20/] The comment was submitted in response to the Board's request for comment and advance notice of proposed rulemaking. In their comment, the agencies urged the Board to amend Regulation B to permit lenders voluntarily to collect information about the race and gender of applicants for non-mortgage credit. According to the comments, the current prohibition of collecting such information "needlessly inhibits the ability of financial service providers to learn about and respond to market opportunities to better serve underserved communities. The prohibition makes it difficult for institutions to know whether products intended to expand access to credit, including to minorities, reach their intended customer base."

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[19/] See supra note 3.

[20/] Letter from Commission, Department of Treasury, Department of Justice, Department of Housing and Urban Development, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Small Business Administration to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System dated May 28, 1998.

The comments also urged the Board to clarify that creditors may not discriminate on a prohibited basis in their preapplication marketing practices.[21/]

The Commission continued its consumer and business education efforts in this area. In September 1998, Commissioner Thompson and Consumer Protection Bureau Director Bernstein participated in credit-related seminars as part of the Congressional Black Caucus Foundation's Legislative Weekend.[22/] Among other things, at this conference, a new FTC credit publication was released. The publication, "Bound for Good Credit," combines in one source for consumers many of the agency's most popular credit brochures (including information about the ECOA).

The Commission staff also worked with other governmental agencies and with creditor and consumer organizations to increase awareness of and compliance with the ECOA. The Commission staff also continued to participate actively in the Interagency Task Force on Fair Lending.

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[21/] The Commission voted 3-1 to file this comment with the Board, with Commissioner Azcuenaga not participating and Commissioner Swindle dissenting and issuing a statement concurring in part and dissenting in part.

[22/] See "FTC Release: FTC Officials Discuss Consumer Credit Issues and Highlight Consumer Education Efforts" (Sept. 18, 1998).

## Electronic Fund Transfer Act

In March 1998, in the America Online, Inc. ("AOL"),[23/] CompuServe, Inc. ("CompuServe"),[24/] and Prodigy Services Corporation ("Prodigy"),[25/] the Commission issued final decisions and orders in three cases alleging violations of the FTC Act and the Electronic Fund Transfer Act ("EFTA") and Regulation E. These cases resolved Commission charges that the companies' "free trial" offers resulted in unexpected charges for many consumers. As reported on last year when the orders were accepted for public comment, the complaints alleged that these Internet service providers failed to make clear that consumers had an affirmative obligation to cancel before the trial period ended. As a result, consumers who failed to cancel were automatically enrolled as members and began incurring monthly charges. The settlements, inter alia, prohibit AOL, CompuServe and Prodigy from: misrepresenting the terms or conditions of any online service trial offer; and representing that an online service is free or otherwise representing that consumers need not pay for the online service, unless they disclose clearly and prominently in their instructional materials any obligation to cancel or take other action to avoid charges, and in all other advertisements include a statement directing consumers to where this disclosure is available. The

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[23/] FTC Docket No. C-3787 (Mar. 24, 1998).

[24/] FTC Docket No. C-3789 (Mar. 24, 1998).

[25/] FTC Docket No. C-3788 (Mar. 24, 1998).

AOL settlement also requires the company to disclose the manner in which fees or charges are assessed or calculated and bars misrepresentations about the terms or conditions of any electronic fund transfer from a consumer account.

## II. AN ASSESSMENT OF THE EXTENT TO WHICH COMPLIANCE IS BEING ACHIEVED BY CREDITORS SUBJECT TO THE COMMISSION'S ENFORCEMENT AUTHORITY[26/]

### Truth in Lending Act and Consumer Leasing Act

This year, the Commission received various inquiries regarding home equity lending, including, for example, those concerning credit insurance and loan "flipping." Many mortgage brokers requested information about the disclosure requirements of Regulation Z, including copies of the regulation and the Board's Official Staff Commentary. Many businesses continued to request information about the lease advertising requirements of Regulation M, including copies of the Commission's brochure, "Advertising Consumer Leases." Some consumers requested information about lease transactions, including copies of the FRB-FTC Lease

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[26/] Among other things, the Commission is charged with enforcement of the FTC Act and various federal consumer credit laws and regulations, including the TILA, ECOA and EFTA, with respect to most nonbank entities in the nation. It does not have data regarding the extent of compliance by these numerous entities with these requirements. In lieu thereof, the Commission is providing information regarding certain issues raised by consumers and/or business entities pertaining to these mandates.

Education Program Team's "Keys to Vehicle Leasing."

Equal Credit Opportunity Act

The Commission received some inquiries about fair lending matters. The Commission continued to receive requests for information about ECOA requirements from mortgage lenders and mortgage brokers.

Electronic Fund Transfer Act

The Commission received some inquiries from consumers regarding EFTA protections for point-of-sale debit transactions, including those regarding unauthorized transactions and error resolution procedures. The Commission receives a small number of inquiries about these rules in comparison to those under the credit and lease requirements.

## III. ANY SUGGESTIONS FOR CHANGES IN THE ACTS OR THEIR IMPLEMENTING REGULATIONS

The Commission supports the Board's regulatory review, now under way, of Regulation B. The Commission also understands that the Board expects to undertake a review of Regulation Z, after conclusion of its Regulation B review. Because Regulation Z affects many diverse types of transactions and issues, the Commission would support any such effort to update and clarify these requirements as well.

The Commission hopes that the information contained in this letter responds to your inquiry and will assist in preparation of the Board's Annual Report to

Congress. If any other information would be useful or if you request additional assistance, please contact David Medine, Associate Director, Division of Financial Practices, at (202) 326-3025.

By direction of the Commission.

Robert Pitofsky
Chairman

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 6, 2000

Dolores S. Smith, Director
Division of Consumer and Community Affairs
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

Dear Ms. Smith:

This letter responds to your request for information regarding the enforcement activities of the Federal Trade Commission ("Commission" or "FTC") under the Truth in Lending, Consumer Leasing, Equal Credit Opportunity, and Electronic Fund Transfer Acts ("Acts") during the past year for use in preparing the Federal Reserve Board's ("Board") Annual Report to Congress. You have asked for information regarding the Commission's enforcement activities pursuant to those Acts, including methods of enforcement and significant enforcement actions and the extent to which compliance is achieved by entities subject to the Commission's enforcement authority. Also, you have asked whether the Commission recommends any changes to these laws or their implementing regulations or wishes to provide any other comments or observations.

## I. A DESCRIPTION OF THE COMMISSION'S ENFORCEMENT ACTIVITIES UNDER THE ACTS DURING THE PAST YEAR

### *Truth in Lending Act and Consumer Leasing Act*

Since January 1999 up to the present, the Commission obtained consent judgments against seven subprime mortgage lenders and their owners for alleged violations of the Home Ownership and Equity Protection Act ("HOEPA"),(1) the Truth in Lending Act ("TILA"), Regulation Z, and/or the Federal Trade Commission Act ("FTC Act"). The Commission also issued a final decision and order against a nationwide mortgage company (and its successor entities) in connection with the company's alleged deceptive cost information and deceptive practices, in violation of the TILA and Regulation Z and the FTC Act. Litigation is also continuing in federal district court regarding a complaint charging a Washington, D.C. mortgage lender and its owner, inter alia, with violating the Truth in Lending Act ("TILA") and Regulation Z and the FTC Act, in connection with alleged deceptive and unfair practices in home mortgage lending. The Commission also issued one consent decree against a vehicle manufacturer, and one consent decree against two related vehicle dealerships and their owner, providing for civil penalties and other relief for alleged lease and/or credit advertising violations of defendants' prior FTC orders settling charges that the entities failed to disclose and/or failed to disclose clearly and conspicuously required lease and/or credit advertising cost information, in violation of the Consumer Leasing Act ("CLA") and Regulation M and/or the TILA and Regulation Z and the FTC Act. The Commission also issued two final decisions and orders, and accepted for public comment consent agreements in five other cases, involving

lease and/or credit advertising. These cases alleged deceptive lease and/or credit advertising claims in violation of the FTC Act and failure to disclose and/or failure to disclose clearly and conspicuously important lease and/or credit cost terms, in violation of the CLA and Regulation M and/or the TILA and Regulation Z, in computer leases or vehicle leases. These cases are discussed below. Other investigations of potential TILA and/or CLA violations are ongoing.

A. Mortgage Cases Alleging HOEPA Violations

In 1999, consent judgments were entered in seven cases against subprime mortgage lenders around the country for alleged violations of the HOEPA, TILA and Regulation Z, and the FTC Act:(2) Federal Trade Commission v. Cooper ("Cooper"),(3) Federal Trade Commission v. Capitol Mortgage Corp. ("Capitol Mortgage"),(4) *Federal Trade Commission v. CLS Financial Services, Inc.* ("CLS Financial"),(5) *Federal Trade Commission v. Granite Mortgage, LLC* ("Granite Mortgage"),(6) *Federal Trade Commission v. Interstate Resource Corp.* ("Interstate"),(7) *Federal Trade Commission v. LAP Financial Servs., Inc.* ("LAP Financial"),(8) and *Federal Trade Commission v. Wasatch Credit Corp.* ("Wasatch Credit").(9) These cases were part of the Commission's "Operation Home Inequity," a law enforcement and consumer education campaign seeking to enforce HOEPA and curb abusive practices in subprime mortgage lending. All seven cases involve injunctive relief under HOEPA, the TILA, Regulation Z, and the FTC Act. In six cases, the defendants agreed to pay consumer redress totaling $572,500; in two cases, the companies must obtain performance bonds before they offer or extend specified credit in the future; and, in one case, defendants are banned from any future involvement with high-cost loans

secured by consumers' homes.

In *Cooper*, the complaint alleged that Barry Cooper dba Barry Cooper Properties violated HOEPA, Regulation Z, and the FTC Act by including a prohibited prepayment penalty in its mortgage loans and by engaging in asset-based lending practices. As part of the settlement, Cooper agreed to pay $25,000 in consumer redress. The consent judgment, *inter alia*, also prohibits Cooper from offering or making any HOEPA loan for five years, unless he first obtains a $150,000 performance bond, and requires Cooper to reform consumers' contracts by nullifying the prohibited provisions.

In *Capitol Mortgage*, the complaint alleged that the company and its principal violated HOEPA Regulation Z, and/or the FTC Act by failing to give consumers the required HOEPA notice and disclosure of terms and by improperly depriving consumers of the three-day waiting period created by HOEPA. The complaint also alleged that defendants included prohibited balloon payments, increased interest rate provisions, and prepayment penalties in loan documents. The complaint further alleged that the company violated TILA and Regulation Z, *inter alia,* by failing to make required disclosures and by engaging in practices that deprived consumers of the three-day right to rescind the loan. The consent judgment, *inter alia*, bars defendants from participating in any activity related to certain high-cost loans secured by consumers' principal dwellings and requires defendants to reform existing contracts to nullify prohibited provisions.

In *CLS Financial*, the complaint charged the company and its main principal with violating HOEPA, Regulation Z, and/or the FTC Act by failing to provide required HOEPA notices

and disclosures and by using prohibited balloon payment and interest rate increase provisions. The complaint also charged that the company made loans involving asset-based lending in violation of HOEPA and that defendants allegedly falsely labeled loans as "open-end" credit in an attempt to evade HOEPA, in violation of the FTC Act. The consent judgment, *inter alia*, requires defendants to pay $60,000 in consumer redress and to reform open loans to nullify prohibited provisions.

In *Granite Mortgage*, the complaint alleged that the company, two other entities, and two principals violated HOEPA, Regulation Z, and/or the FTC Act by failing to provide required HOEPA notices and disclosures. The complaint also alleged that defendants violated HOEPA,
Regulation Z, and/or the FTC Act by using prohibited prepayment penalty provisions and engaging in asset-based lending. The complaint also charged the company and other entities with failing to provide required TILA disclosures. The consent judgment, *inter alia*, requires defendants to pay $132,500 in consumer redress and to reform open loans to nullify prohibited provisions.

In *Interstate*, the complaint alleged that the company and two principals violated HOEPA, Regulation Z, and/or the FTC Act by failing to provide material credit information as required by HOEPA. Under the consent judgment, defendants are required, inter alia, to pay $50,000 in consumer redress.

In *LAP Financial*, the complaint charged the company and its principal with numerous violations of HOEPA, Regulation Z, and/or the FTC Act, including failure to provide required HOEPA notices and disclosures; asset-based lending; using

prohibited prepayment penalties; and making direct payments to home improvement contractors. The complaint also alleged that the company violated TILA and Regulation Z by failing to provide required disclosures and engaging in rescission-related violations. The consent judgment, inter alia, requires defendants to pay $250,000 in consumer redress and to reform loans by nullifying prohibited provisions.

In *Wasatch Credit*, the complaint charged Wasatch Credit, related entities, and two principals with violating HOEPA, Regulation Z, and/or the FTC Act by failing to provide HOEPA notices and disclosures and/or by improperly depriving consumers of the three-day HOEPA waiting period. The complaint also alleged that defendants used prohibited balloon payment and increased interest rate provisions and engaged in asset-based lending, in violation of HOEPA, Regulation Z, and/or the FTC Act. It further alleged that defendants violated TILA, Regulation Z, and/or the FTC Act by failing to provide required disclosures and engaging in practices that deprived consumers of their right to rescind the loan. It also alleged that, in violation of the FTC Act, defendants directed borrowers to falsely characterize consumer loans as business loans (in an apparent attempt to evade HOEPA and the TILA) and that one entity falsely represented to consumers that the credit offered and extended was open-end when, in fact, it was closed-end. Under the consent judgment, defendants are required, inter alia, to pay $55,000 in consumer redress and to reform existing contracts to nullify prohibited provisions. Defendants are also prohibited from offering or extending consumer credit, unless they first obtain a $250,000 performance bond that would remain in effect for five years.

**B.** ***Other Mortgage Cases***

In *Fleet Finance, Inc. and Home Equity U.S.A., Inc.* ("Fleet Finance"),(10) the Commission issued a final decision and order settling charges that Fleet Finance violated the TILA and Regulation Z, and engaged in deceptive practices in violation of the FTC Act, by failing to provide accurate, timely disclosures of the costs and terms of home equity loans (and other consumer credit transactions) to consumers and by failing to provide or accurately provide consumers with information about their home equity rescission rights. More specifically, the complaint charged that Fleet Finance extended consumer credit transactions or purchased consumer credit transactions, in which Fleet Finance acquired or retained a security interest in the consumers' principal dwellings, and failed to provide the consumers with the right to rescind the credit transactions by, inter alia: 1) failing to provide consumers with notices of the right to rescind; and 2) waiving consumers' right to rescind, and disbursing funds, pursuant to oral and other insufficient waivers. The complaint also alleged that Fleet Finance in extending consumer credit transactions: 1) failed to provide consumers with all TILA-required disclosures of the costs and terms of credit and/or provide these disclosures prior to consummation of credit transactions; 2) failed to provide or accurately provide certain TILA disclosures, including the annual percentage rate. The complaint also alleged that Fleet Finance purchased consumer credit transactions that failed to provide or accurately provide required TILA disclosures. The complaint also alleged that Fleet Finance failed to retain, inter alia, TILA disclosures and rescission notices for two years, in violation of Regulation Z.

The order requires Fleet Finance and its successor companies,

Home Equity U.S.A. (incorporated in Rhode Island and Delaware), to pay $1.3 million for consumer redress and administrative costs. The redress program applies to certain consumers whose mortgage loans were originated or purchased by Fleet Finance or a predecessor company (also named "Fleet Finance") between January 1, 1990 and December 31, 1993. The program covers certain consumers whose mortgage loans, inter alia, were paid off to or written off by Fleet Finance, the predecessor, or Fleet Financial Group, Inc., a parent corporation. The program also covers certain consumers who contact an 800-number set up under the proposed order and provide information showing they are eligible for consumer redress under the terms of the order. The order also prohibits Fleet Finance and its successor companies, inter alia, from future violations of the TILA and Regulation Z and from various misrepresentations of credit costs and terms.

In *Federal Trade Commission v. Capital City Mortgage Corp.* ("Capital City Mortgage"),(11) litigation continued against a Washington, D.C. area mortgage company and its owner in this case alleging numerous violations of federal laws, inter alia, the TILA and Regulation Z and the FTC Act.(12) The complaint alleges, inter alia, that defendants violated the TILA and Regulation, and engaged in unfair or deceptive acts or practices in violation of the FTC Act, by, inter alia: 1) understating the annual percentage rate and finance charge; 2) failing to disclose or accurately disclose the payment schedule (including failing to disclose a balloon payment); and 3) failing to provide disclosures that accurately reflect the legal obligation. The complaint also alleges that defendants engaged in other deceptive or unfair practices in offering and extending credit and throughout the loans, in violation of the FTC Act, with the result that a number of borrowers were

overcharged on their loans, were defaulted, and had title to their homes or other property impaired or completely lost (along with the equity). The complaint asks the court to award, inter alia, the amount necessary to prevent unjust enrichment and consumer redress (including refunds of monies paid, disgorgement of ill-gotten gains, and rescission of contracts) and to permanently restrain defendants from future law violations. The discovery phase in the case ended on December 20, 1999; a trial date has not yet been set.(13)

### C. *Lease and Credit Advertising Cases*

In *United States v. Mazda Motor of America, Inc.* ("Mazda"),(14) a consent decree was entered against a vehicle manufacturer settling charges that it violated a 1997 FTC order ("FTC order")(15) and various state orders in connection with its televised lease advertisements. Under the FTC order, Mazda was required, inter alia, to disclose important lease terms in advertisements clearly and conspicuously and as required by the CLA and Regulation M. According to the complaint, following issuance of the FTC order, Mazda ran important lease terms in televised advertisements in small and unreadable print, offset by distracting images or sounds, or that appeared on the screen for too short a time. Under the consent decree, Mazda is required to pay $5.25 million -- the largest civil penalty ever in a FTC consumer protection matter: $4.05 million in civil penalties for alleged violations of the FTC order and $1.2 million in fines and costs to 24 states as part of the settlement. Mazda is also required to provide its dealers with consumer education brochures on vehicle leasing for distribution to consumers for one year and to distribute, inter alia, copies of lease and credit regulations to its dealers. Under the consent decree, Mazda is also prohibited from

violating the CLA and Regulation M.

In *United States v. Suntrup Buick-Pontiac-GMC Truck, Inc.*, Suntrup Ford, and Thomas Suntrup ("Suntrup"), (16) a consent decree was entered against two St. Louis vehicle dealerships and their chief executive officer ("CEO") settling charges that defendants violated a 1998 FTC order ("FTC order")(17) in connection with their lease and credit advertisements. Under the FTC order, Suntrup was required to disclose important financial information in lease and credit advertisements "clearly and conspicuously" and as required by the CLA and Regulation M and the TILA and Regulation Z. According to the complaint, following issuance of the FTC order, Suntrup's vehicle leasing advertisements stated the amount of any payment or that any or no initial payment was required at lease inception but failed to disclose clearly and conspicuously required financial information, including the total amount due prior to lease inception, by, inter alia, using small type, short durations or distracting sounds or images, and also omitted certain required lease terms. In addition, the complaint alleged that Suntrup's vehicle credit advertisements offered just "$1 down" without disclosing required credit terms. Under the consent decree, Suntrup is required to pay a $40,000 civil penalty - the first ever collected by the Commission for such an order violation by a vehicle dealership or its CEO. Suntrup is also required for two years to make the brochure, "Keys to Vehicle Leasing,"(18) available to consumers who visit the dealerships.

In *Dell Computer Corp. ("Dell")*(19) and Micron *Electronics, Inc. ("Micron")*,(20) the Commission issued final decisions and orders against two computer leasing companies resolving charges that they violated the CLA and Regulation M and the FTC Act, by disseminating misleading advertisements for

consumer leases primarily in Internet promotions. The complaints in these cases charged, inter alia, that the companies disseminated deceptive lease advertisements that offered low monthly payment amounts and placed material cost information in unreadable fine print or an inconspicuous location or omitted such information altogether -- including, inter alia, that the monthly payments are components of lease offers, whether or not a security deposit is required, and/or the number and timing of scheduled payments. Under the orders in these cases, respondents must, inter alia, provide all the disclosures required by the CLA and Regulation M for lease advertisements "clearly and conspicuously," that is, in a clear, readable (or audible), and understandable manner. The orders also prohibit the companies from running advertisements that highlight low monthly payments, unless the promotions also state, inter alia, clearly and conspicuously, that: 1) the transaction is a lease; 2) the total amount due at lease signing; 3) whether or not a security deposit is required; and 4) the number, amount, and timing of scheduled payments. The orders also prohibit the companies from making any reference to a charge that is part of the total amount due at lease signing or that no such amount is due, unless the promotion also states with equal prominence the total amount due at lease inception. In addition, the orders require respondents to comply with all requirements of the CLA and Regulation M.

The Commission also issued for public comment consent agreements with six Philadelphia, Pennsylvania-area vehicle dealerships and their CEOs for violations of the CLA and/or TILA and FTC Act pertaining to deceptive lease and/or credit advertisements:(21) Northeast Auto Outlet, Inc. ("Northeast"),(22) Norristown Automobile Co. ("Norristown"),(23) Dunphy Nissan, Inc. ("Dunphy"),(24)

Marty Sussman Organization, Inc. ("Marty Sussman"),(25) Pacifico Ford, Inc. ("Pacifico Ford"),(26) and Pacifico Ardmore, Inc. ("Pacifico Ardmore").(27) These cases involve actions for omitting or burying in fine print key cost information in advertised lease and/or credit deals.

In all six cases, the complaints alleged deceptive vehicle lease advertisements, in violation of the FTC Act, either by failing to disclose and/or failing to disclose adequately essential lease information. The six dealerships and their CEOs were charged with hiding many costs associated with the lease in fine-print disclosures located far from the more prominent claims of low monthly payments or with omitting these costs. The complaints also alleged, inter alia: 1) that Dunphy misrepresented the amount due at lease inception by promoting low down payments or "$0 down," when additional fees were due at lease signing; 2) that Dunphy and Northeast represented that consumers could buy the advertised vehicle for a low monthly charge, while the offer was for a lease; 3) that Northeast misrepresented that the dealer's "double your down payment"offer was available for the advertised vehicles when it was not. In all six cases, the complaints also alleged that the lease advertisements used triggering terms under the CLA and Regulation M, but failed to disclose or failed to disclose clearly and conspicuously other required information, such as the total amount due at leasing signing, and that the promotions stated a down payment amount more prominently than the disclosure of the total amount due at lease signing.

In addition, the complaints charged that Dunphy, Norristown, Northeast and Pacifico Ardmore ran deceptive credit promotions in violation of the FTC Act, by failing to disclose and/or failing to disclose adequately critical credit terms, by

omitting required terms or placing this information in fine-print disclosures located far from the more prominent low down payment claims. The complaints against these four dealers also alleged that the credit advertisements used triggering under the TILA and Regulation Z, yet omitted or failed to disclose clearly and conspicuously required information. All six complaints also allege that the dealers' credit advertisements stated a rate of finance charge without stating that rate as an "APR," in violation of the TILA and Regulation Z.

The consent agreements in these six cases would require these dealerships and their CEOs, inter alia, to make clear and accurate cost disclosures in their lease and/or credit advertisements. In all six cases, the proposed orders would prohibit these entities from placing advertisements that state the amount of any payment due at lease inception (excluding the monthly payment) or the fact that any or no inception payment is due, without also disclosing with "equal prominence" the total amount due at lease inception. The proposed orders would also prohibit respondents from disseminating lease promotions that state the amount of any payment, or that any or no initial payment is required at lease inception, unless the advertisements also clearly and conspicuously disclose other required lease information, such as the total amount due at lease inception and whether or not the consumer must pay a security deposit. All respondents would also be required to comply with all provisions of the CLA and Regulation M. In addition: 1) Dunphy would be prohibited from misrepresenting the costs of leasing, including the amount due at lease inception; 2) Dunphy and Northeast would be prohibited from representing that the advertised terms apply to a cash or credit offer when, in fact, they apply only to lease a particular vehicle; and 3) Northeast

would be prohibited from misrepresenting the availability of any advertised offer. All respondents would also be required to comply with all provisions of the TILA and Regulation Z.

### D. *Consumer and Business Education*

The Commission continues to view consumer and business education efforts as important to its enforcement activities. In 1999, in connection with continuing concerns about possible home equity fraud, the Commission issued a consumer publication to provide information to consumers considering home equity loans, "Need a Loan? Think Twice About Using Your Home as Collateral." In addition, the federal Interagency Task Force on Fair Lending, of which the Commission is a member, issued a consumer brochure to facilitate shopping and negotiating for a home mortgage, "Looking for the Best Mortgage: Shop, Compare, Negotiate."(28) The Commission staff also continued to participate in the Board-sponsored "Lease Education Program Team," involving the Board, Commission staff, and a coalition of entities (including consumer groups, state attorneys general and industry representatives), which developed various online educational materials and a computer program to enhance awareness and understanding of leasing. The Commission's above consumer protection materials were also made available to the public through the Commission's website at "www.ftc.gov."(29)

## Equal Credit Opportunity Act

In 1999, the Commission obtained consent decrees against two vehicle finance companies for violations of the Equal Credit Opportunity Act ("ECOA") and its implementing Regulation B. Litigation continues in a case involving a

subprime mortgage lender. Those three cases are discussed below. Other enforcement efforts continue.

In *United States v. Franklin Acceptance Corporation* ("Franklin"),(30) a consent decree was entered settling allegations that a vehicle finance company discriminated against applicants on the basis of sex, marital status and the fact that an applicant's income derived from public assistance sources, and when taking adverse action on an application, failed to provide notice as required under the ECOA and the Fair Credit Reporting Act ("FCRA"). The complaint alleged that Franklin discriminated against applicants on the basis of sex and marital status by discounting or excluding from consideration the income of an applicant who received payments of child support. The complaint alleged that Franklin discriminated against applicants on the basis of marital status by failing to aggregate the incomes of unmarried co-applicants while aggregating the income of married co-applicants. The complaint alleged that Franklin discriminated against applicants who derived their income from public assistance by discounting or refusing to consider such income. In addition, the complaint alleged that, when taking adverse action on an application, Franklin failed to provide the applicant with written notification of the action taken, failed to disclose the specific reasons for the action taken or to disclose the applicant's right to request such reasons, and, when adverse action was based on a report from a consumer reporting agency, failed to provide notice as required under the FCRA. Under the consent decree, defendants agreed to pay a civil penalty of $800,000 and to the entry of a permanent injunction.

In *United States v. Ford Motor Credit Co.*,(31) a consent decree was entered resolving allegations that this vehicle

finance company discriminated in the pricing of its credit products against applicants on the basis of marital status. The complaint alleged that the company failed to aggregate the incomes of unmarried co-applicants while aggregating the income of married co-applicants with the result that unmarried co-applicants often paid more for credit. Under the consent decree, defendants agreed to pay $650,000 to a consumer redress program and to the entry of a permanent injunction.

Litigation continued in *Capital City Mortgage*,(32) alleging that the company and its owner violated the ECOA and Regulation B by: failing to take written applications for mortgage loans; failing to collect required information about the race or national origin, sex, marital status, and age of applicants; failed to provide rejected applicants with written notice of adverse action; and, when providing notice of adverse action, failed to provide applicants with the correct principal reason for the action taken or the correct name and address of the Commission, the federal agency that administers compliance with the ECOA with respect to defendants. The complaint seeks civil penalties and injunctive relief for the alleged violations of the ECOA and Regulation B.

In November 1999, the Commission and other federal agencies submitted a joint comment to the Board about Regulation B.(33) The comment was submitted in response to the Board's notice of proposed rulemaking with respect to Regulation B. In their comment, the agencies urged the Board to amend Regulation B to allow lenders voluntarily to collect information about the race and gender of applicants for non-mortgage credit. According to the comment, the current prohibition of collecting such information "inhibits the ability of financial service providers to learn about and respond to

market opportunities to provide credit to underserved communities. The prohibition makes it difficult for institutions to know whether products intended to expand access to credit, including to minorities, reach their intended customer base." The comment also urged the board to clarify that creditors may not discriminate on a prohibited basis in their preapplication marketing practices and to clarify how creditors may determine the need for special purpose credit programs.(34)

The Commission continued its consumer and business education efforts. The staff worked with other governmental agencies and with creditor and consumer organizations to increase awareness of and compliance with the ECOA. The Commission also continued its active participation in the Interagency Task Force on Fair Lending.

### Electronic Fund Transfer Act

In 1999, the Commission continued its consumer and business education efforts in this area. The Commission issued a brochure, "Guide to Online Payments," providing information to consumers about different types of online payment systems and security features.(35)

## II. AN ASSESSMENT OF THE EXTENT TO WHICH COMPLIANCE IS BEING ACHIEVED BY ENTITIES SUBJECT TO THE COMMISSION'S ENFORCEMENT AUTHORITY(36)

### Truth in Lending Act and Consumer Leasing Act

This year, the Commission received, inter alia, numerous inquiries concerning home equity lending, including concerning consumer rights under HOEPA. Many mortgage brokers, and some online mortgage entities, requested materials regarding the requirements of Regulation Z. Many credit and lease advertisers requested information regarding Regulations Z and M. Some consumers requested information regarding their TILA rights concerning unauthorized transactions and error resolution, including for online transactions.

### Equal Credit Opportunity Act

The Commission received various inquiries about fair lending and predatory lending issues. The Commission also received requests for information about ECOA from mortgage brokers.

### Electronic Fund Transfer Act

The Commission received some requests from consumers for information about EFTA protections pertaining to point-of-sale debit transactions, including for unauthorized use and error resolution. The Commission continues to receive a small number of inquiries about these requirements in comparison to those under the credit and lease area.

## III. ANY SUGGESTIONS FOR CHANGES IN THE ACTS OR THEIR IMPLEMENTING REGULATIONS

The Commission supports the Board's regulatory review of Regulation B. The Commission understands that the Board

may undertake a review of Regulation Z, following conclusion of its Regulation B review. In view of the diverse transactions and issues affected by Regulation Z, the Commission would also support any such effort in the future to update and clarify Regulation Z as well.

The Commission hopes that the information contained in this letter responds to your inquiry and will assist in preparation of the Board's Annual Report to Congress. If any other information would be useful or if you request additional assistance, please contact David Medine, Associate Director, Division of Financial Practices, at (202) 326-3025.

By direction of the Commission.

Robert Pitofsky Chairman

Endnotes:

1. In this report, HOEPA, which amends the TILA and is implemented by Regulation Z, is referenced separately. HOEPA provides special protections for consumers who obtain high-rate or high-fee loans secured by their principal dwellings by requiring creditors to provide certain material information at least three days before the loan is consummated, prohibiting the use of certain loan terms, and barring specified practices.

2. The Commission voted 4-0 to approve the settlements, with Commissioner Swindle concurring in part and dissenting in part.

3. No. CV 99-07782 WDK (C.D.Cal. Aug. 2, 1999).

4. No. 2-99-CV580G (D. Utah Aug. 23, 1999).

5. No. C99-1215 Z (W.D. Wash. Jul. 30, 1999).

6. No. 99-289 (E.D. Ky. Aug. 12, 1999).

7. No. 99 Civ. 5988 (S.D. N.Y. Jul. 30, 1999).

8. No. 3:99 CV-496-H (W.D. Ky. Aug. 5, 1999).

9. No. 2-99CV579G (D. Utah Aug. 23, 1999).

10. FTC Docket No. C-3899 (Oct. 5, 1999).

11. No. 98CV00237 (D.D.C. filed Jan. 29, 1998).

12. The complaint in this matter also alleges, inter alia,

violations of the Equal Credit Opportunity Act. See infra p.11.

13. The case is joined, for purposes of discovery, with a private lawsuit, Hargraves v. Capital City Mortgage Corp., No. 98CV1021 (D.D.C. filed Apr. 24, 1998).

14. No. SACV-99-1213 AHS (C.D. Cal. Oct. 7, 1999).

15. FTC Docket No. C-3714 (Feb. 6, 1997).

16. No. 4:99CV01746CEJ (E.D. Mo. Nov. 22, 1999).

17. FTC Docket No. C-3779 (Jan. 5, 1998).

18. This brochure was previously jointly developed by the FTC staff, Federal Reserve Board staff, and various industry representatives and consumer groups and explains, in simple terms, vehicle leasing transactions and costs.

19. FTC Docket No. C-3888 (July 28, 1999).

20. FTC Docket No. C-3887 (July 28, 1999).

21. The consent agreements were placed on the public record for public comment for sixty days, after which the Commission will decide whether to make them final. See 64 Fed. Reg. 68687 (Dec. 8, 1999).

22. FTC File No. 992 3080 (Dec. 2, 1999).

23. FTC File No. 992 3081 (Dec. 2, 1999).

24. FTC File No. 992 3082 (Dec. 2, 1999).

25. FTC File No. 992 3078 (Dec. 2, 1999).

26. FTC File No. 992 3079 (Dec. 2, 1999).

27. FTC File No. 992 3116 (Dec. 2, 1999).

28. The members of the Interagency Task Force include the: Department of Housing and Urban Development, Department of Justice, Department of the Treasury, Federal Deposit Insurance Corporation, Federal Housing Finance Board, Federal Reserve Board, Federal Trade Commission, National Credit Union Administration, Office of Federal Housing Enterprise Oversight, Office of the Comptroller of the Currency, and Office of Thrift Supervision.

29. Information concerning the Commission's enforcement actions and other activities discussed in this report are also available at this website.

30. No. 99-CV-2435 (E.D. Penn. May 14, 1999).

31. No. 99-75887 GEW (E.D. Mich. filed Dec. 9, 1999).

32. See supra note 11.

33. Letter from Commission, Department of Treasury, Department of Justice, Department of Housing and Urban Development, Office of the Comptroller of the Currency, Office of Thrift Supervision, Small Business Administration, and Office of Federal Housing Enterprise Oversight to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System dated November 15, 1999.

34. The Commission voted 3-1 to file this comment with the

Board, with Commissioner Swindle dissenting and issuing a separate statement.

35. This brochure was jointly developed by the Commission and America Online, Inc. ("AOL"). AOL was required to develop consumer education materials regarding online payment systems, pursuant to a final decision and order issued by the Commission (previously reported). See FTC Docket No. C-3787 (Mar. 24, 1998).

36. Among other things, the Commission is charged with enforcement of the FTC Act and various federal consumer financial laws and regulations, including the TILA, ECOA, and EFTA, with respect to most nonbank entities in the nation. It does not have data regarding the extent of compliance by these numerous entities with these requirements. In lieu thereof, the Commission is providing information regarding certain issues raised by consumers and/or business entities pertaining to these mandates.

# APPENDIX 2

| | |
|---|---|
| STATE OF SOUTH CAROLINA | ) |
| | ) IN ARBITRATION |
| COUNTY OF BARNWELL | ) |
| | ) |
| Daniel B. Lackey, George Buggs, Florine Buggs, Michael Highsmith, and Paula Johnson, | ) |
| | ) |
| Plaintiffs, | ) |
| | ) MEMORANDUM |
| v. | ) OF GREEN TREE |
| | ) FINANCIAL |
| Green Tree Financial Corporation. | ) CORPORATION |
| | ) |
| Defendant. | ) |
| | ) |

## INTRODUCTION

This memorandum is submitted on behalf of the Defendant Green Tree Financial Corporation (hereinafter Green Tree). The purpose of this memorandum is to address the single issue of whether an arbitration may proceed as a class action in the absence of specific language in the arbitration agreement permitting class treatment arbitration. Additional issues concerning class certification under Rule 23 and questions of the necessity for class treatment are reserved to be addressed at a later time if necessary.

Arbitration was compelled in this case pursuant to the Federal Arbitration Act (FAA) 9 USCA § 1 et. seq. Green Tree submits That federal law interpreting the FAA controls this issue and preempts stare law or regulation to the contrary. Green Tree submits further that the principle has been well established in the federal decisions dealing with or related to the issue that the parties may not be subjected to state class

action procedures in arbitration unless the arbitration agreement expressly permits class treatment in arbitration.

## STATEMENT OF FACTS

Green Tree is a financial services company doing business nationwide. From the complaint it appears that the Plaintiffs *Highsmith, Johnson* and Buggs are *all individuals* who financed the purchase of mobile homes. The Plaintiff Lackey financed home improvements. The consumer financing paper in each transaction was assigned to Green Tree. Each of the transactions involved a mortgage an real property in South Carolina. However, the Highsmith and Lackey transactions took place in Georgia. The other Transactions took place in South Carolina.

Each of the named Plaintiffs executed a Retail Installment Sales Contract which included an agreement to submit all claims to arbitration. While the wording of the agreements were not identical, they each required arbitration and none of the arbitration agreements permit class treatment in arbitration. Attached hereto for the arbitrators convenience are affidavits filed with the Court in connection with previous proceedings identifying the financing agreements.

Green Tree moved in the Circuit Court to stay the litigation and compel arbitration. The motion to compel arbitration was denied. On appeal The Circuit Court's order was reversed by the Court of Appeals. The case was remanded to the Circuit Court for further proceedings.

## SUMMARY OF ARGUMENT

1. The FAA supersedes state law and procedure and requires the enforcement of arbitration agreements according to their terms and no more, notwithstanding state law or procedure to the contrary.

2. State class action procedures may not be superimposed on an arbitration under the FAA unless the arbitration clause specifically provides for class action treatment.

## ARGUMENT

The FAA reflects a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem. Hosp. V. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The primary legislative purpose of the FAA is to assure the enforcement of arbitration agreements. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). While Congress recognized that enforcement of arbitration agreements would normally promote efficient and speedy dispute resolution, the cases are clear that promotion of efficiency is secondary to the enforcement of the terms of the arbitration agreement.

> We therefore are not persuaded by the argument that the conflict between two goals of the arbitration act - - enforcement of private agreements and encouragement of efficient and speedy dispute resolution must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern in passing the act was to enforce private

> agreements into which the parties had entered, and that concern requires that we vigorously enforce agreements to arbitrate even, if the result is 4, piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. ***

Id., p.221

There is no discretionary right in a trial court to refuse to enforce the arbitration agreement as written. Id. A court may not substitute its notions of fairness or judicial economy in place of the explicit terms of the agreement. As noted in Champ v. Siegel Trading Company, 55 F. 3d 269, 275 (7th Cir., 1995),

> The underlying motivation for the Federal Arbitration Act was to enforce the agreement of parties to arbitrate. Because the act was designed to overrule the historical refusal of the judiciary to enforce agreements to arbitrate, it follows that a court is not permitted to interfere with private arbitration agreements in order to impose its own view of speed and economy. This is the case even where the result would be the possibility of inefficient maintenance of separate proceedings.

See American Centennial Insurance Company v. National Casualty Company, 951 F.2d 107, 108 (6th Cir 1991). The South Carolina Supreme Court has recognized that the FAA preempts contrary state law. Soil Remediation Co. V. Nu-Wav Environmental, 317 S.C. 274, 476 S.E. 2d 149 (1996). Federal law therefore governs the enforcement of the FAA in both state and federal courts. Moses H. Cone Mem. Hosp., 460 U.S. at 24.

Section 4 of the FAA provides that when a court determines that an agreement to arbitrate exists, the court must order the parties to "proceed with the arbitration in accordance with the terms of the agreement." Parties to an arbitration agreement are entitled to have their agreement enforced "as they wrote it - and nothing more." Champ, 55 F.3d at 277. As noted in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990), Congress "surely did not intend that the parties be able to disregard selected contractual obligations willy-nilly in order to choose an arbitral foram more convenient or more suited to a party's particular needs."

Along these lines, the United States Supreme Court noted that arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." Volt Info. Sciences v. Bd. Of Trustees, 489 U.S. 468, 479 (1989). To hold otherwise would "fundamentally modify the terms of the parties' contract." Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 N.Y. 2d 173, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (1995) (refusing to order expedited arbitration because arbitration agreement contained no such provision). From the forgoing it is apparent that in order to determine whether this case may proceed in arbitration as a class action, the Arbitrator must resort to federal law, and state law and procedure contrary to federal law interpreting the FAA has no application. Cohen v. Wedbush, Noble, Cooke, Inc., 941 F.2d 282, 285 (9th Cir. 1985)

The decisions applying federal law have determined without apparent exception that state class action procedures may not be imposed on an arbitration under the FAA unless *the*

arbitration agreement specifically provides for class treatment. Champ, supra; Gammaro v. Thorp Discount, 828 F. Supp. 673 (D. Minn. 1993); McCarthy v. Providential Corp, 1994 WL 387852,1994 U.S. Dist. LEXIS 10122 (N.D. Cal. 1994); Randolph v. Green Tree Financial Corp. 991 F.Supp. 1410 (N.D. Ala. 1997).

Similarly, courts have held that other procedural devices such as consolidation of cases under Federal Rule 42 must also yield to the express language contained in an arbitration agreement, and cannot be imposed unless specifically allowed. American Centennial, 951 F.2d 107, In American Centennial, the Sixth Circuit Court of Appeals dismissed a petition for consolidation of arbitration proceedings on the ground that the arbitration agreements did not provide for consolidation. See also Government of United Kingdom v. Boling Co., 998 F.2d 68 (2d Cir., 1993) (reversing an order granting a motion for consolidation); Protective Life Ins. Corp v. Lincoln National Life Ins. Corporation, 873 F.2d 281 (11th Cir. 1989). (holding that parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in. Id., p. 282.); McCarthy v. Providential Corporation, 1994 U.S. Dist. Lexis 10122 (D.C. Cal. 1994) (holding that class arbitration may not be ordered in the absence of a provision in an arbitration clause providing for arbitration on a class wide basis); see also Weverhaeuser Co. v. Western Seas, Shipping Co., 743 F.2d 635 (9th Cir. 1984), cert. denied, 469 U.S. 1061, 83 L. Ed, 2d 431, 105 S.Ct. 544 (1984) (parties may negotiate for and include provisions for consolidation of arbitration proceedings, but if they do not, court's cannot read such provisions into the agreement). Fundamentally, arbitration agreements must be enforced according to their specific terms and no others. Volt Info. Sciences v. Bd. of Trustees, 489 U.S. 468 (1989); Del E. Webb

Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987); Baesler v. Continental,Grain Co., 900 F.2d 1193 (8th Cir. 1990).

In *Champ*, the Seventh Circuit Court of Appeals rejected the argument That class arbitration is appropriate where the arbitration clause is silent on the issue- The Court stated that its "chief concern under the FAA is to enforce the parties arbitration (agreement) as they wrote it." To do otherwise would be to substitute the judgment of the court for the intent of the parries to the contract, contrary to the 46 overriding, goal' of the FAA to put arbitration agreements on equal footing with other contracts between private parries." 55 F.3d at 274, 275.

Cases allowing class arbitration under state law axe not applicable to enforcement of arbitration provisions under the FAA because of federal preemption over state law under the FAA. Episcopal Housing Corp, v. Federal Insurance Co., 269 S.C, 63 ) 1, 239 SE 2nd 647 (1977). Class action procedures may not be imposed on, an arbitration under
the FAA unless the arbitration provision specifically pen-nits class action treatment, and the arbitration provision in this case does not so provide.

The cases holding that class action procedures may *not* be superimposed on an arbitration clause enforceable under the FAA are based on fundamental principles of substantive contract law. Volt, 489 U.S. 468; Champ, 55 F. 3d 269. Class action rules are procedural devices permitting consolidation of matters properly before the court. Such procedural rules Should not be allowed to thwart the substantive contractual light of the parties to have individual disputes arbitrated, Nor can the procedural rules of class action be used as a method for the discovery of names and addresses of potential plaintiffs in

an effort to generate additional claims, "Class actions are provided only as a
means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means for the ends - to sacrifice the goal for the going." Vernon v. Drexel, Burnham & Co., 52 Cal. App. 3 rd 706 (1975); see also Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. I (1982) (holding that an arbitration agreement must be enforced as written even though arbitration would result in bifurcated proceedings).

For a court to substitute its notions of fairness of judicial economy in place of the explicit terms of the agreement would "deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." Champ, 55 F.3d at 275. Reading such terms into an agreement would "disrupt the negotiated risk/benefit allocation and direct [the parties] to proceed with a different sort of arbitration," Id.

## CONCLUSION

Under the FAA, the arbitration agreements involved in this case must be enforced according to their express terms, and no others. The arbitration agreements are silent on the issue of class treatment and no such procedure can therefore be imposed upon the proposition that class action parties. The overwhelming weight of authority stands for the treatment should not be permitted in this arbitration and that an order compelling class treatment is beyond the power of the arbitrator. Green Tree respectfully submits that the Plaintiffs' motion for class certification should be denied.

---

Herbert W. Hamilton
Daniel J. Ballou
KENNEDY COVINGTON LOBDELL
& HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731
(803) 329-7600
ATTORNEYS FOR GREEN TREE
FINANCIAL CORPORATION

August 14, 1998

GRANTED

22

Supreme Court, U.S.
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No. 99-1235

In The

# Supreme Court of the United States

GREEN TREE FINANCIAL CORP. – ALABAMA AND GREEN TREE FINANCIAL CORPORATION,

*Petitioners,*

v.

LARKETTA RANDOLPH,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## *AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF RESPONDENT

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PATRICIA STURDEVANT
(*Counsel of Record*)
National Association of Consumer Advocates
1717 Massachusetts Avenue, N.W., Suite 704
Washington, D.C. 20036
(202) 332-2500

MICHAEL D. DONOVAN
DONOVAN MILLER, LLC
1608 Walnut Street, Suite 1400
Philadelphia, PA 19103
(215) 732-6020

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## STATEMENT OF INTEREST OF AMICUS[1]

The National Association of Consumer Advocates ("NACA") is a non-profit organization of private and public sector attorneys, legal services attorneys, and law professors concerned with the protection and representation of consumers. NACA's mission is to promote justice for all consumers. NACA maintains a forum for information sharing among consumer advocates across the country and serves as a voice in the ongoing struggle to curb unfair and abusive business practices.

NACA long has been concerned about the imposition by businesses of mandatory, pre-dispute arbitration clauses on their customers. The expense and the inherent limitations on discovery, injunctive relief, and appellate review which characterize arbitration materially disadvantage consumers, particularly for relatively small individual claims. Consistent with its goal of promoting justice for consumers, NACA has appeared as *amicus curiae* in a number of cases challenging mandatory predispute arbitration clauses, including *Badie v. Bank of America*, 79 Cal. Rptr. 273 (1998), *rehearing denied* Dec. 2, 1998, *rev. denied*, 1999 Cal. LEXIS 1198, and other cases involving attempts by financial institutions to obtain an advantage over consumers by unilaterally selecting a forum which does not enable consumers to enforce their statutory rights. NACA has also drafted a Position Paper, identifying frequent abuse by institutional interests of

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[1] This brief is filed with the consent of all parties, and letters of consent have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief.

mandatory binding arbitration and the consequent denial to consumers of access to the courts and to justice, a copy of which is attached at Appendix (App.) 1.

## SUMMARY OF ARGUMENT

Legitimate arbitration, according to the Court's jurisprudence, simply substitutes one fair forum for another. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 634 (1985). As recognized by the Court of Appeals below, the present case does not involve legitimate arbitration. It involves instead an attempt by a well-financed and powerful business enterprise, supported by scores of institutional interests, to gain an unfair and deceptive dispute resolution advantage over individual consumers. This type of "arbitration" is not the type of alternative dispute resolution envisioned by Congress when it enacted the Federal Arbitration Act in 1925, 9 U.S.C. §§ 1-16 ("FAA"). Nor is it the type of arbitration the Court has deemed subject to the federal policy favoring enforcement of consensual arbitration clauses.

NACA urges the Court to adopt an objective, federal standard to guide courts, businesses, consumers and arbitral providers as the minimum standard required before an arbitration clause may be considered legitimate and therefore subject to the federal policy favoring enforcement of consensual arbitration. NACA submits that a legitimate arbitration clause must meet the following three-part test:

1. The clause must not materially shift the economic costs or risks of dispute resolution onto a party who would not otherwise bear

those costs or risks before a formal judicial forum;

2. The clause must not deprive one party of substantive rights or remedies or permit a party to obtain possession of the personal or real property subject to the dispute outside of the arbitration process; and
3. The clause must identify the manner in which the arbitration proceeding is to be commenced.

NACA submits that each of the many arbitration clauses this Court has confronted under the FAA has met these minimum standards. The clause involved in the present case, however, violates each one of these standards and should be held to be illegitimate under the FAA.

As we demonstrate below, and as the Court of Appeals correctly held, petitioner's clause dramatically shifts the economic costs and risks of dispute resolution away from the party who drafted the clause and onto the party forced to proceed in arbitration. In addition, petitioner's clause permits petitioner to take possession of the property subject to the arbitration dispute by means of a separate judicial or nonjudicial foreclosure proceeding wholly outside of the arbitration process and before the arbitration has even concluded. In this way, petitioner may obtain such an overwhelming economic and tactical advantage that the arbitration becomes a meaningless charade. Even more striking is the utter failure of petitioner's clause to provide any indication of how the alternative dispute mechanism is to be commenced. While the FAA may fill some gaps by enabling a federal court to appoint an arbitrator where an arbitration clause is silent

on the subject, it cannot fill that gap here. Oddly, petitioner's clause specifies that petitioner shall choose the arbitrator, but it totally fails to provide fair notice and an opportunity to be heard. The clause is, in reality, nothing more than a tricky drafting device designed to smother all disputes and squelch even legitimate claims.

## ARGUMENT

### I. GREEN TREE'S ARBITRATION CLAUSE IS DESIGNED TO SQUELCH DISPUTES, NOT RESOLVE THEM.

As conceived and implemented by the consumer financial services industry, arbitration of consumer disputes does not simply involve an alternative forum, as this Court envisioned in *Mitsubishi*. Instead, arbitration of disputes between consumers and financial institutions is intended to, and does in operation, significantly disadvantage consumers. One of the primary proponents of arbitration, Alan S. Kaplinsky, counsel for *amici* American Bankers Association, American Financial Services Association, Consumer Bankers Association, and National Home Equity Mortgage Association, candidly admits that:

> Arbitration materially changes the dispute resolution rules that consumers and borrowers are accustomed to: there is no right to a jury trial, pre-hearing discovery is limited, class actions are eliminated and appeals are severely circumscribed.

Alan S. Kaplinsky, *Anatomy Of An Arbitration Clause: Drafting and Implementation Issues Which Should Be*

*Considered By A Consumer Lender*, 1113 PLI/Corp. 655, 657 (1999).

Adoption of arbitration in the consumer financial services context has been portrayed as a defense against consumers. "Consumers have been ganging up on banks. But now the institutions have found a way to defend themselves." Alan S. Kaplinsky & Mark J. Levin, *Excuse me, but who's the Predator? Banker's side*, ABA Bus. L. Today 24 (May/June 1998) ("*Predator*"). This defense shifts the costs on to consumers, eliminates the consumers' right to a jury trial, and results in markedly reduced liability for business. *See, e.g.*, Patricia Sturdevant & Dwight Golann, *Face Off: Should Binding Arbitration Clauses Be Prohibited In Consumer Contracts?* Desp. Resol. Mag., Summer 1994, at 5 (App. 5); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 684 (1996) ("*Panacea*").

Arbitration was first adopted in the consumer financial services arena by ITT Consumer Financial Services Corporation in 1989. ITT had been sued for packing unwanted insurance into consumer loans by governmental and private attorneys in fourteen different jurisdictions and had lost or settled most of those cases for substantial sums of money. ITT admitted that it had committed many improper practices in a consent judgment with the Arizona Attorney General, settled a case by the California Attorney General for more than $50 million, and was facing claims in another case in Minnesota for an additional $48 million. Dwight Golann, *Consumer Litigation In The Age Of Combat Banking*, 45 Bus. Law. 1761, 1762-67 (1990).

In response, ITT inserted an arbitration clause into its standardized form small loan contracts, and hired Equilaw, Inc., the parent corporation of the National Arbitration Forum ("NAF"), to provide a mechanism for resolving claims by consumer borrowers across the country.[2]

A few years later, in 1992, Bank of America became the first major financial institution to insert arbitration clauses into its accounts with retail customers. Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts Or A Trap For The Unwary Consumer?* Loyola Consumer Law Reporter, 112, 115 (1993). The bank adopted arbitration as a response to a series of major judgments and settlements adverse to California banks, including a $5.2 million jury verdict for excessive late and overlimit fees on credit card accounts which was upheld on appeal,[3] and a $55 million settlement by several major banks of a price fixing case challenging the interest rates on credit cards. Dwight Golann, *Consumer Financial Services Litigation: Major Judgments And ADR Response*, ABA, The Business Lawyer, May, 1993. The bank publicly admitted it had chosen arbitration to avoid unpredictably high damage awards by juries. Press release dated June 2, 1992 (App. 14).

A contemporaneous study on the introduction of private, binding arbitration in the banking industry by The Rand Institute for Civil Justice confirmed that private

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[2] ITT's arbitration clause was held to be unconscionable in *Patterson v. ITT Consumer Financial Services Corporation*, 14 Cal. App. 4th 1659 (1993), *cert. denied*, 510 U.S. 1176 (1994).

[3] *Beasley v. Wells Fargo Bank, N.A.*, 235 Cal. App. 3d 1383, 1407 (1991), *review denied*, No. S0244, 1992 Cal. LEXIS 1220 (Cal. Mar. 12, 1992).

arbitration mechanisms were adopted to reduce the institutions' exposure to liability by limiting the risk of punitive damages and large jury verdicts, and thereby reducing the incentives for plaintiffs' attorneys to take cases. *See* Erik Moller, Elizabeth Rolph, and Patricia Ebener, *Private Dispute Resolution in the Banking Industry* 6-8, 12-13, 32 (1993) ("The Rand Study"). Lenders have acknowledged elsewhere that the motivating factors triggering the inclusion of arbitration requirements for consumer disputes was the fear of exposure to lender liability lawsuits and punitive damage verdicts. Lloyd N. Shields, *The Role of Mandatory Arbitration for Financial Institutions*, Arb. J., Dec. 1991, at 49.

The facts therefore fully support the observation of one eminent commentator that the adoption of arbitration clauses was "a carefully planned strategy by influential members of the financial services industry to resolve lender liability and other claims made by consumers as a group." Mark E. Budnitz, *Arbitration Of Disputes Between Consumers And Financial Institutions: A Serious Threat To Consumer Protection*, Ohio State Journal On Dispute Resolution, Vol. 10, No. 2, 367, 369 (1995). Indeed, as industry counsel have admitted, consumer financial services companies have implemented arbitration programs to gain an economic and litigation advantage over consumers. Alan S. Kaplinsky & Mark J. Levin, *Alternative To Litigation Attracting Consumer Financial Services Companies*, Consumer Financial Services Law Report, 1102 PLI/Corp. 845, 847 (1999). Thus, the simple but unpleasant fact is that arbitration is marketed as a way to avoid the costs and risks of the court system.

Some providers of arbitration services even offer preferential treatment as an inducement to financial institutions to utilize their services. For example, at Appendix 27 is a letter dated October 20, 1997 from Edward Anderson of NAF ("The Anderson Letter")[4] stating that: "major American companies are moving all of their contracts to an arbitration basis as fast as possible. There is no reason for your clients to be exposed to the costs and risks of the jury system." The Anderson Letter emphasizes that: "Every award is **limited to the amount claimed!**" (emphasis in original). A "Legal Memorandum" from "Forum Counsel" on the subject of "Arbitration & Class Actions in Financing" is attached to the Anderson Letter (App. 28). The memorandum advises that: "In the court system, financing transactions are always at risk for Class Action treatment. . . . " It further states that: "Most often, the claims of class action plaintiffs' lawyers are based on printed or computer-generated documents or standard procedure manuals, which leave little room to argue against 'commonality' and 'typicality.' " The memorandum then boasts that rules drafted in the manner of the NAF's will preclude class actions, even if the plaintiffs'

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[4] Documents taken from the 1994 Bankruptcy Petition of NAF's corporate parent, Equilaw, Inc., (App. At 33), indicate that Mr. Anderson was then a director, officer, and major shareholder of Equilaw. A deposition of Mr. Anderson taken in 1994 indicates that prior to coming to NAF, he was Assistant General Counsel to ITT Consumer Financial Services Corporation, (Anderson Deposition Excerpt, App. at 38), and that he learned of NAF when ITT was searching for an ADR provider (App. at 39).

claims are "common" and "typical." Thus, NAF has effectively marketed its arbitration service not as an alternative forum, but as a defensive measure to squelch consumer disputes.

It is clear therefore that the purpose and intent of mandatory arbitration clauses in financial institutions' standardized form contracts is to limit institutional liability and change the rules by which disputes are resolved to the detriment of their customers. The unilateral imposition of arbitration for such purposes provides an altered, rather than an alternative forum, and finds no support in sound public policy or in the FAA or its legislative history.[5]

Arbitration clauses undoubtedly deter consumers from challenging business practices which legislatures have specified are unlawful, deceptive, or unfair. The 1993 Rand Study found that after Bank of America unilaterally adopted mandatory arbitration, substantially fewer consumers brought claims against the bank. Moller *et al., Private Dispute Resolution in the Banking Industry,* at 21-23.

Arbitration in consumer cases does not provide an alternate forum; it sets up a more favorable private forum for institutions. Robert Raven, when he was President of the American Bar Association, warned that "certain forms of private judging dispense with many of the most cherished and carefully developed features of our public system: open proceedings, written decisions, appellate

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[5] The Brief *Amicus Curiae* filed by Public Citizen sets forth the legislative history of the FAA and demonstrates that the Act was intended only to validate consensual agreements between business entities to arbitrate their differences without altering the substantive rights of either party.

review, and the evolution of the common law." Robert D. Raven, *Private Judging: A Challenge to Public Justice*, 74 A.B.A. J. 8 (Sept. 1, 1988). President Raven further observed: "the potential dangers of providing one system of justice for the affluent, and another for everyone else, should stimulate us all to improve our system of public justice. This 200-year-old system with vital safeguards cannot simply be replaced by private judging." *Id.* Those cherished features of public adjudication are not present in arbitration.

### A. Arbitration Has Not Proved To Be Less Expensive Than Litigation.

The claim by Green Tree's *amici* that arbitration is beneficial to consumers because it is less expensive (Br. *Amici Curiae* of American Bankers, *et al.*, at 4, 14-15) reflects an initial expectation, or myth, that is devoid of support in reality. Because providers of arbitration services such as the American Arbitration Association impose filing fees which far exceed the fees charged by courts, and in addition charge administrative, processing, and hearing fees, and because the parties must pay for the time of the arbitrator, while judges and courts are publicly funded, arbitration is inordinately expensive, and may be far more costly than litigation. Patricia Sturdevant, *Mandatory Arbitration and Access To Justice*, Association of Business Trial Lawyers (ABTL) Report, Vol. 3, No. 1, 12 (November, 1993).

Few studies have been conducted to determine the costs of arbitration and even those have produced mixed results. Scholars from the Rand Institute for Civil Justice have explored the question in the greatest detail. The Institute's Deborah R. Hensler concludes that the answer

to the question whether ADR programs actually reduce costs for litigants is still largely unknown. Deborah R. Hensler, *Does ADR Really Save Money? The Jury's Still Out*, Nat'l Law J., April 11, 1994, at C2 (App. 40). Another study of private alternative dispute resolution in Los Angeles indicates that fees charged in arbitration "usually greatly exceed those levied by the courts." Elizabeth Rolph, Erik Moller, Laura Peterson, *Escaping The Courthouse*, Rand Institute for Civil Justice 1, 44 (1994). The study notes that "the fees charged for private ADR services can be large" and then summarizes fee structures for the major private ADR firms. Those firms charge hearing fees for the arbitrator in the range of $550 a day to $450 a hour for each party, and also charge administrative fees, transcript fees, reporters' costs, travel expenses, and conference room costs. *Id.* at 40-43.

Thus, it simply has not been demonstrated that arbitration is cheaper than litigation. *See* Sternlight, *Panacea, supra*, at 678-79. Nor has it been shown that arbitration is faster than litigation. Another commentator notes that there is little strong data supporting the theory that ADR saves significant time and money for participants in the system. Lucy C. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. Disp. Resol. 1, 46 (*"Two-Headed Monster"*). The myth that arbitration is cheaper is not supported by any real basis in fact, and the Eleventh Circuit's concern about the steep costs of arbitration here were well founded.

### B. The Severe Limit On Discovery In Arbitration Favors Business Interests.

The limits on discovery in arbitration often make it impossible for consumers to prove the business engaged in unlawful activity. The FAA provides for only a very limited type of discovery by permitting arbitrators to order that witnesses may bring documents to the hearing. 9 U.S.C. § 7 (1982). Most arbitration providers similarly limit discovery to what an arbitrator, in his discretion, may order. Commentators agree that arbitration substantially reduces the amount of permissible discovery. Budnitz, *supra*, at 271; Edward Brunet, *Questioning The Quality Of Alternative Dispute Resolution*, 62 Tul. L. Rev. 1, 13 (1987); Kaplinsky & Levin, *Alternative, supra*, at 847. But just and fair results of any dispute resolution process require mechanisms that ensure full disclosure of the facts. Disputes simply cannot be decided properly without information and evidence. Brunet, *supra*, at 34.

The unavailability of discovery in arbitration generally favors corporate interests, to the individual's detriment. Absent discovery, individuals frequently will be unable to succeed on their claims, because the corporation customarily will have exclusive possession of the information and documents necessary to prove the claims. Budnitz, *supra*, at 283-84. Arbitrators frequently confine their review to documents relating solely to the affected individual, and do not examine underlying policies or evidence of business practices which would be necessary to award broader relief. For example, it would have been impossible for plaintiffs to prevail on their challenge to excessive late and overlimit fees in *Beasley v. Wells Fargo Bank, supra*, without discovery into the bases on which the bank decided to impose those charges and

the cost data which it claimed supported the propriety of the charges. In short, the unavailability of discovery skews the system in favor of corporate defendants. David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee And Consumer Rights Claims In An Age Of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 61 (*"Small Print"*).

### C. Arbitration Has Been Adopted To Preclude Representative Consumer Actions.

Consumers who must resolve their disputes through arbitration often lose the right to bring representative actions; as a result, in cases involving small claims they are denied any effective remedy against unlawful business conduct. Statutes such as the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, rely on private enforcement through representative actions, and the congressional design for private enforcement would be frustrated by compelled arbitration. But mandatory arbitration clauses are now being relied on by industry to argue that consumers must individually arbitrate each claim and are deprived of any right they might have to pursue consolidated claims, group or collective actions, or class actions unless the arbitration clause includes an agreement allowing such procedures. This argument, of course, ignores the reality that an arbitration clause unilaterally drafted by the financial institution to limit its liability will never include a provision permitting such actions.

It also disregards the Court's precedents. In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980), the Court stated:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of

> litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

The Court reiterated in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997), that absent class actions, individuals whose damages are small will have no realistic prospect of obtaining relief:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

The observation that there is no incentive for individuals with only small potential recoveries to pursue their claims applies forcefully to this case and others like it. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available."); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693, 696 (N.Y. App. Div. 1986), *aff'd*, 516 N.Y.S.2d 652 (N.Y. 1987) ("[I]t is notable that in determining whether a class action is superior to

other viable methods, it is clear that most of the individuals having claims averaging less than $31 would have no realistic day in court if a class action were not available."); 4 Herbert Newberg, *Newberg on Class Actions* § 21.01 at 21-3 (3d ed. 1992) ("There are compelling reasons for bringing consumer protection class actions. A class-based effort is more effective than an individual consumer in getting a defendant to modify its conduct. Most individual consumers have claims which are too small to warrant representation by an attorney.")

Therefore, arbitration is not simply an alternative forum, but no forum at all for the overwhelming majority of consumers with small monetary claims. Unless they are able to aggregate those claims and litigate them in a class action, consumers will have no effective means of redress. In the consumer context, where small amounts are often at stake, in the absence of class litigation, unlawful and deceptive conduct which deprives large numbers of people of small amounts of money in violation of statutory proscriptions will be allowed to continue with no meaningful deterrent.[6]

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[6] This is not piecemeal litigation, which the Court indicates may be necessary to give effect to an arbitration agreement in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983). There, the consequence was simply that the hospital's dispute with the construction company might be decided in arbitration, while the hospital's claim for indemnity for any liability it had to the construction company against the architect, with whom it had no arbitration agreement, would be resolved in court: "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Id.* Here, the consequence will be that consumers are deprived of any remedy whatever because their individual claims are too

Lenders like Green Tree have adopted arbitration clauses as a way of giving themselves an economic and tactical advantage by significantly reducing the likelihood of representative litigation. Alan S. Kaplinsky is quite clear in recommending to his institutional clients that they adopt arbitration clauses as a way of defending themselves against class action lawsuits. "Arbitration is a powerful deterrent to class action lawsuits against lenders. . . . " Kaplinsky & Levin, *Predator, supra,* at 24. Elsewhere, the same authors have asserted that courts cannot compel class arbitration if parties have not agreed to it. Kaplinsky & Levin, *Alternative, supra,* at 848.

These authors contend that: "[A]ll of the dangers inherent in an individual consumer lawsuit – the threats of costly and drawn-out litigation, runaway juries, gargantuan punitive damages awards and adverse publicity – are magnified exponentially when a class of . . . consumers is certified." They further assert: "Stripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue." Kaplinsky & Levin, *Predator, supra,* at 26.

They predict a future free from the threat of consumer challenges to the industry:

> It is anticipated that virtually all major banks and lending institutions will implement consumer arbitration procedures within the next five years. Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multi-million-dollar class action lawsuits that might

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small for them to have any realistic probability of obtaining relief.

> have been avoided had arbitration procedures been in place.

*Id.* at 28.

The intent to change the rules to favor business interest at the expense of consumers by eliminating the primary remedies against abusive practices that deprive small sums of money from a large number of individuals could hardly be clearer. In another communication from NAF, Curtis D. Brown, its Vice President and General Counsel, states to a prospective industry client that "A number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements *eliminates class actions* and ensures that credit-related lawsuits will be directed to arbitration, not a jury trial." (App. 50) (emphasis in original).

The preclusion of representative actions would result in consumers with relatively small claims being denied any effective remedy against unlawful business conduct. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are usually impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without representative actions, wrongdoing businesses would be able to profit from their misconduct, violate statutory rules with impunity, and retain their ill-gotten gains. Representative actions by consumers aggregate their interests, enable them to take on economically powerful institutions, make wrongful conduct less profitable by obtaining disgorgement of ill-gotten gains, and have a salutary deterrent effect. *See* National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 370, 377-78 (1998).

Consumer cases differ significantly from matters involving securities and age discrimination, where administrative agency involvement can be relied on to ensure the sufficiency of the arbitration procedures to adequate enforcement of statutory protections. In *Shearson/American Express v. McMahon*, 483 U.S. 1056 (1987), the Court noted the importance of the oversight authority of the Securities and Exchange Commission and found arbitration procedures which had been approved by the Commission adequate to protect statutory rights. Here, in stark contrast, the arbitration provider and procedures are unknown, so their adequacy to protect statutory rights is wholly speculative.

Similarly, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court found reason to believe that statutory rights would be safeguarded even if individuals could not bring class actions because the EEOC could bring actions on behalf of classes of persons. Here, by contrast, there is no requirement for first filing charges with an agency comparable to the EEOC which could then bring actions for damages and equitable relief on behalf of a class. Hence, there is no meaningful check against abusive and predatory arbitration processes imposed on consumers.

The Court has recognized the important distinction between consumer and commercial contracts in *Rodriguez De Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989), overruling *Wilko v. Swan*, 346 U.S. 427 (1953), which held that claims arising under the Securities Act of 1933 were not subject to arbitration, saying: "We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements *in the*

*setting of business transactions.*" (Emphasis added). The Court thus specifically limited its holding to arbitration in the commercial context.

Thus, for the consumer dispute involved here, there will be no effective brake against illegitimate and abusive arbitration clauses absent intervention by the Court.

### D. There Is Virtually No Right To Appeal An Incorrect Arbitrator's Award.

The FAA establishes only very limited bases for appealing an arbitral award in 9 U.S.C. § 10, and for a court to vacate, modify, or correct an award in 9 U.S.C. § 11. An arbitrator's award may only be reversed on a showing that it was obtained by corruption, fraud, or prejudicial misconduct. Combining that standard with the fact that arbitrators generally need not rule according to the law, and need not give reasons for the decision, the effect is that any right to appeal is essentially eliminated, and decisions will not be reversed even if they are wrongly decided.

As this Court has noted, a court will set an arbitrator's decision aside only in very unusual circumstances. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In fact, courts virtually never reverse arbitral decisions. Sternlight, *Panacea, supra*, 18 n.9; Schwartz, *Small Print, supra*, at 3. This raises serious questions about the fairness of arbitration, because parties lose the important ability to remedy mistakes of fact or law, which does not exist when an erroneous trial court decision is appealed. Even in the limited circumstances in which a court can overturn an arbitrator's decision, because arbitrators need not explain the bases for their decisions or make a

complete record of the proceedings, aggrieved individuals are often ill-equipped to satisfy their burden of proof on appeal. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).[7]

Petitioners' contention that post-arbitration review would be sufficient to remedy any refusal to award a prevailing plaintiff costs and attorney's fees (Brief of Petitioners at 41) is belied by the case law. For example, the Second Circuit refused to find that an arbitrator's failure to award attorneys fees in an age discrimination case met the manifest disregard of the law standard. In *DiRussa v. Dean Witter Reynolds*, 121 F.3d 818 (2d Cir. 1997), the court held that although a prevailing plaintiff's entitlement to attorney's fees under the ADEA was well-defined, explicit, and clearly applicable, the manifest disregard standard was not met because there was no persuasive evidence that the arbitrator had understood that an award of attorney's fees was mandatory and yet had intentionally refused to comply with the law. It would be virtually impossible to satisfy such a stringent test, so there is no assurance whatever that post-arbitration review would result in awards of attorney's fees to prevailing plaintiffs, as the statute mandates.

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[7] A decision by California's highest court indicates the degree of deference accorded an arbitral decision. In *Moncharsh v. Heily & Blase*, 832 P.2d 899, 900 (Cal. 1992) (en banc), an arbitrator's decision was found not generally reviewable, even if it was incorrectly decided as a matter of fact, or erroneously decided on the law.

**E. Arbitration Undermines Public Accountability.**

Another reason financial institutions attempt to compel arbitration is to escape the publicity which accompanies litigation. Budnitz, *supra*, at 271, 285. The defense bar has admitted that arbitration reduces the risk of adverse publicity. Kaplinsky & Levin, *Alternative, supra*, at 847. Arbitration is essentially conducted in private. Brunet, *supra*, at 13. Both the proceedings and the decisions are required to remain confidential. *Id.*

Businesses favor this privacy, preferring customer disputes to remain free from the disinfecting rays of public scrutiny. Businesses naturally fear that publicity may reduce customers' trust, alert regulators to unfair practices or spotlight illegal conduct. Budnitz, *supra*, at 285.

The publicity accompanying litigation, in contrast, enhances accountability and furthers the public interest in ensuring the laws are enforced. The publicity following a verdict of fraud or deceptive practices lets consumers and regulators know about illegal practices. *Budnitz, supra*, at 313. The inability of consumers to learn about the experiences of other people closes off access to an important source of this useful information, and allows companies to control information. "The lack of publicity may be particularly detrimental in the context of consumer claims because one set of consumers will not be able to learn from the misfortunes of others." Sternlight, *Panacea, supra*, at 695 & n.326. Confidentiality undermines the governmental enforcement and regulatory apparatus designed to protect the consumer and ensure a fair marketplace. Budnitz, *supra*, at 327.

Requiring that disputes be resolved by arbitration, from which governmental entities are excluded, also creates a disincentive for consumers to complain to agencies. That deprives agencies of the data they need to identify patterns and practices of unlawful behavior and limits their ability to take appropriate enforcement and regulatory action. Budnitz, *supra*, at 312-313. The lack of publicity also reduces the likelihood that other companies will modify their practices, as often occurs after a publicized court decision or jury award.

### F. Arbitration Impedes Development of the Common Law.

Resolving disputes privately also impedes the continued development of a body of consumer protection law. Budnitz, *supra*, at 312. Industry counsel readily acknowledge that because arbitrations are confidential and arbitrators are not required to issue a written opinion, development of the common law is stifled. Kaplinsky & Levin, *Alternative*, *supra*, at 848. Stunting the development of this common law clearly harms consumers. *See* Brunet, *supra*, at 19-20.

The Rand Study expresses grave concern about arbitration's lack of public standards:

> Since the results of private arbitration are not usually matters of public record, they cannot be used in these fashions, to establish standards of conduct for the future or to bring attention to unwanted behavior. This brings into serious question the legal system's ability to effect changes in the common law and in statutory interpretation when private ADR is widespread.

Moller et al., *supra*, at xiii.

The Rand Study also notes the adverse public consequences of private dispute resolution. It describes the danger that arbitration will silence cases involving potentially damaging precedents or information, and that cases that would once have been part of the common law through litigation will be lost to the system, thus failing to provide a guide for future behavior. *Id.* at 10 and 32. In a later study, scholars from the Rand Institute for Civil Justice further explain that the most significant threat to the evolution of case law is posed by the prospect that whole classes of disputes might be removed from the public sector. Rolph, et al., *Escaping the Courthouse, supra,* at 62. That threat, unfortunately, is being realized in the consumer financial services arena.

### G. Arbitration Allows the Financial Services Industry to Deregulate Itself.

The use of arbitration clauses gives large firms power to displace the judiciary from its role in enforcing statutory rights. Schwartz, *supra,* at 37. By selecting mandatory binding arbitration, institutions avoid applicable precedent or resort to regulatory agencies, and limit their liability, so that the arbitration clauses function as a kind of corporate self-deregulation. Forcing disputes involving statutory claims into arbitration delegates to arbitrators the role of industry regulator. Budnitz, *supra,* at 320. "The real problem comes when parties who are otherwise protected by an important public law are compelled to use an ADR procedure in lieu of coming to court and then have no meaningful review in court." Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration Of Statutory Claims In Employment?* 16 Ga. St. U. L. Rev. 293, 295

(1999). Judge Edwards emphasizes that a public enforcement mechanism is required to protect statutory rights. *Id.* at 297.

### H. The Benefits of Arbitration Are Illusory.

Not only is there no proof that arbitration is cheaper, but there also is no support for the claim that it is better for individuals. Arbitration awards for consumers generally are smaller. Schwartz, *supra*, at 9. This is confirmed by the Rand Study, which found that awards in arbitration decisions were typically less than those in jury verdicts. Moller et al., *supra*, at 11.

The claim of *Amici* American Bankers, et al. that consumers will be successful in arbitration because one commentator found that employees do well (Brief at 19-20), is thus contravened by the limited existing data, and unpersuasive, in light of their own admission that "there are no major studies analyzing arbitration in the consumer context." *Id.* at 17.

### I. Arbitration Also Reflects An Anti-Consumer Bias.

Arbitrators are often biased in favor of large corporate "repeat player" clients. Arbitrators face powerful economic incentives that can affect their neutrality. If an arbitrator rules against a corporate client too often, the company can easily take its business to another arbitrator. Sternlight, *Panacea, supra*, at 684-85; Schwartz, *supra*, at 60-61. "Considering the parties' frequency of need for an arbitrator, the arbitrator's necessary qualifications for being selected, and the payment plan, the odds are against the individual plaintiff versus the manufacturers, health providers, and corporate landlords who will likely

be parties to dispute resolution time and again." James L. Guill, Edward A. Slavin, Jr., *Rush to Unfairness: The Downside of ADR*, 28 Judges' Journal 1, 8, 11 (1989). A study of this phenomenon in the employment context concludes that employees recover a lower proportion of their claims in repeat player cases than in non-repeat player cases. L. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emply. Rts. & Empl. Policy Journal 1 (1997).

Another example of arbitrations conducted by NAF for First USA is illustrative. In almost 20,000 cases, the vast majority of them brought by the company, NAF arbitrators ruled for First USA 99.6% of the time. Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One Sided*, The Washington Post, March 1, 2000 (App. 52). Such an overwhelming disparity in results raises serious questions about the fairness of the process.

In short, Green Tree's arbitration clause is illegitimate because petitioner has adopted it not to obtain an alternative forum, but to obtain an unfair advantage over its consumers.

## II. IN OPERATION, GREEN TREE'S CLAUSE PERMITS PETITIONER TO OBTAIN POSSESSION OF THE PROPERTY SUBJECT TO THE DISPUTE BEFORE ARBITRATION IS CONCLUDED.

Not only does petitioner's clause materially shift the economic costs and risks of dispute resolution onto respondent, but it also allows petitioner to take possession of the property subject to the dispute outside of the arbitration process. In particular, Green Tree's clause provides:

> Notwithstanding anything hereunto the contrary, we retain the option to use judicial or nonjudicial relief to enforce a mortgage, deed of

> trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose any collateral, to obtain a money judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.

(J.A. 36). By its plain terms, this clause allows Green Tree to split all disputes with its customers and to obtain judicial or non-judicial foreclosure and even a money judgment prior to or even in spite of a contrary ruling by an arbitrator. Green Tree therefore retains the significant threat of repossession and claim preclusion outside of the arbitration process. Since Green Tree itself controls how the arbitration process is commenced, including the costs involved, it can time that process to maximize its litigation leverage (including claim and issue preclusion) by proceeding with repossession while relegating even consumer counterclaims to arbitration. Thus, while petitioner and its amici trumpet the supposed merits and efficiency of arbitration, they have, in fact, stacked the litigation deck in their favor by reserving for themselves alone the right to proceed in a judicial forum.

The illegitimacy of such a provision is apparent in the fact that a consumer is left powerless under the contractual language. Any plea to an arbitrator to enjoin Green Tree from proceeding with a foreclosure or money judgment claim would certainly be met with the argument that

the arbitrator lacked such power. Indeed, the same clause expressly reserves the judicial option to Green Tree, thus precluding arbitral review or intervention.

This unique contrivance certainly distinguishes the present clause from all the other arbitration clauses the Court has previously considered under the FAA. In contrast with those cases, the clause here is clearly intended to tilt the dispute resolution landscape in petitioner's favor. It is not intended to provide an alternative forum. It is intended to lock consumers away in a private, unspecified process, the initiation and costs of which are totally controlled by Green Tree. Neither Congress nor the Court ever intended the FAA to permit such a result.

## III. GREEN TREE'S ARBITRATION CLAUSE IS ILLEGITIMATE BECAUSE IT FAILS TO SPECIFY HOW ARBITRATION IS INITIATED AND IS NOT CONSENSUAL.

Petitioner's clause lacks an essential element necessary for legitimacy under the FAA – notice of how the dispute resolution mechanism is initiated. Under the clause, Green Tree selects the arbitrator. But there is absolutely no notice of how that selection process is initiated. Does the consumer simply write to Green Tree? Does the consumer call? Does the consumer refuse to pay his or her bill?

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court emphasized that "a waiver of constitutional rights in any context must, at the very least, be clear." *Id.* at 95. In this regard, notice and an opportunity to be heard have been the hallmarks of the Court's due process analysis. The *Fuentes* Court emphasized that form contractual provisions in consumer transactions purporting to waive these

basic due process rights would not be enforced if evidenced only by a consumer's signature on the contract. *See id.; see also Swarb v. Lennox*, 405 U.S. 191 (1972); *cf. D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

In this case, the impact of petitioner's tilted arbitration clause is no less drastic to consumers than were the confiscatory confession of judgment clauses struck down in *Fuentes* and *Swarb*. As in those cases, Green Tree's customers here confront the very real likelihood of losing their property without any effective notice or opportunity to be heard to prevent that eventuality. Although there is the sham appearance of such an opportunity, the alternative arbitration forum and process is so controlled by Green Tree and the remedies are so restricted that the arbitration is really a modern-day confession of judgment.

Applying fictional concepts of consent to adhesionary contracts between financial institutions and consumers distorts the law of contract and the traditional use of the arbitration mechanism beyond recognition. Arbitration is a creature of contract, premised on the ability of parties of equal bargaining power to choose what method of resolving disputes will best serve their mutual needs. This Court has frequently acknowledged that arbitration is premised on consent. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (arbitration is a matter of consent, not coercion).

Meaningful consent simply does not exist in the present case. Unlike the parties to most contracts between business entities, individuals contracting for goods and services generally do not have equal bargaining power. In most instances, a marked imbalance in knowledge and power characterizes such contracts. Adhesionary contracts are not freely negotiated, but are offered on a take-it-or-leave-it basis. They are imposed by a powerful party

on a relatively powerless party who has no ability to negotiate. Budnitz, *supra*, at 328. Indeed, the essence of form contracts is that they can rarely if ever be negotiated by the consumer. Sternlight, *Panacea, supra*, at 676-77.

The Restatement (Second) of Contracts notes that "[a] party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms." Restatement (Second) of Contracts § 211 comment b (1979). When the party with superior sophistication, knowledge, and financial resources inserts a mandatory arbitration clause into a form contract, individuals usually are unaware of and cannot reasonably be said to have consented to these terms. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 599 (1991) ("the common law . . . subjects terms in contracts of adhesion to scrutiny for reasonableness"). Rather, the reality is, as Professor Sternlight points out,[8] consumers do not understand either the terms or their import.

Unilateral imposition of mandatory, binding arbitration in adhesionary contracts has none of the indicia of choice, consent, or bargaining. Instead, it is well recognized that: "[w]ith the growth of ADR has come a strong element of compulsion and coercion." Katz, *Two-Headed Monster, supra*, at 1.[9] The compulsion and coercion here

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[8] Sternlight, *Panacea, supra*, at 688-693, and studies cited at n.290, 289, and 300.

[9] The compulsion and coercion which are inherent in the mandatory imposition of alternative dispute resolution mechanisms has led the European Commission to file comments opposing alternatives which preclude consumers' recourse to the courts in e-commerce disputes. (App. 59).

has deprived respondent of basic due process and renders petitioner's clause illegitimate under the FAA.

## CONCLUSION

The FAA does not legitimate one-sided agreements which attempt to give the institutional party an unfair advantage over its consumer customers. So long as mandatory, pre-dispute clauses are used to change the rules by which disputes are resolved, and limit industry liability, their use will not accomplish the ostensible goals of inexpensive, prompt and fair dispute resolution. Where, as here, business interests seek to gain an unfair advantage, preclude class and representative actions, constrict the availability of statutory remedies, limit or eliminate any challenge to their deceptive business practices, and increase costs to consumers, their abusive arbitration clauses should be deemed unenforceable.

Respectfully submitted,

PATRICIA STURDEVANT
*(Counsel of Record)*
National Association of Consumer Advocates
1717 Massachusetts Avenue, N.W., Suite 704
Washington, D.C. 20036
(202) 332-2500

MICHAEL D. DONOVAN
DONOVAN MILLER, LLC
1608 Walnut Street, Suite 1400
Philadelphia, PA 19103
(215) 732-6020

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NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES

1717 Massachusetts Avenue, Suite 704

Washington, D.C. 20036

Telephone (202) 332-2500

Fascimile (202) 332-4152

# POSITION PAPER: REASONS TO OPPOSE PRE-DISPUTE ARBITRATION CLAUSES IN CONSUMER CONTRACTS

## I. Overview.

Recent years have witnessed an assault on the rights of consumers to access to the courts, and to trial by judge and jury. Banks, credit card companies and other financial institutions are jeopardizing consumers' rights to the protections afforded them by statutory and case law through the use of mandatory, binding arbitration clauses. These clauses are drafted by the financial institutions and unilaterally inserted in adhesionary contracts with consumers, without negotiation or consent. Arbitration as a method of resolving disputes is a creature of contract premised on the ability of parties of equal bargaining power to choose what method of resolving disputes will best serve their mutual needs. Free choice is the foundation of all alternative dispute mechanisms, including arbitration, and the reason such clauses are enforceable is because they reflect the bargain between the parties. Unilateral imposition of binding arbitration raises troublesome issues for consumer advocates because of the

potential for abuse by institutional interests and the consequent denial to consumers of access to the courts and to justice.

## II. Specific Problem With Pre-Dispute Arbitration Clauses.

A. The purpose and intent of such clauses is to insulate unlawful, unfair, or deceptive practices from any meaningful review by making it difficult to obtain discovery, impairing consumers' ability to proceed on behalf of a class, and to reduce compensatory and punitive damage awards.

B. By placing arbitration clauses into contracts before a dispute arises, the consumer is deprived of any way to intelligently decide if she really wants arbitration or if it will be an appropriate way to resolve that particular dispute.

C. Discovery is not available as a matter of right, but is within the discretion of the arbitrator. This can make the proceedings very unfair to consumers if they need to obtain documents from the defendant to demonstrate the nature and scope of challenged business practices.

D. Arbitration, unlike the court system, requires that the parties pay a high filing fee as well as a daily fee to the arbitrator(s), and may impose other fees for hearings, processing, and administration. The costs of arbitrating may exceed the costs of litigating, and are often in excess of the amount in dispute.

E. The arbitrator need not follow precedent or explain the reasons for his or her decision, so consumer protection statutes and case law can be ignored.

F. The proceedings are secret, so challenged practices will not be brought to the attention of the public generally or to the regulatory authorities such as the Federal Trade Commission, making it more difficult for abusive practices to be uncovered.

G. An arbitrator does not have the power to order injunctive relief. The consumer victimized by a widespread business practice may obtain individual recovery, but may not be granted an order that the wrongful practice cease.

H. The arbitrator's decision is immune from judicial review, except on very narrow grounds, such as fraud by the arbitrator, and a decision is final and binding even if it is wrongly decided as a matter of fact or incorrect as a matter of law.

I. The company chooses the forum, which can lead to proceedings which are conducted in an inconvenient forum and are inordinately expensive.

J. The supposed preference for arbitration as a means of resolving disputes is derived from a series of Supreme Court cases between commercial entities which had bargained for the speed and efficiency of arbitration, so the Court was merely enforcing a freely negotiated contractual agreement between parties of equal bargaining power. That rationale is inapplicable to cases involving consumers who did not know about, negotiate, or accept the clause.

K. Defendants argue that arbitration may not proceed on a class wide basis, requiring consumers to pursue each case individually and depriving them of a very important procedural tool for stopping wrongful conduct and obtaining meaningful relief.

L. Future consumers are deprived of the clarification and development of consumer law through the courts. Statutes and regulations are full of ambiguity

and uncertainty which case, law could rectify and which the drafters of new and revised laws need for informed decisionmaking.

App. 5

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# FACE OFF: Should Binding Arbitration Clauses be Prohibited in Consumer Contracts?

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## FACE-OFF

## Should Binding Arbitration Clauses be Prohibited in Consumer Contracts?

by Patricia Sturdevant and Dwight Golann

**YES:**
*Pre-Dispute Arbitration Clauses are Unfair to Consumers*

Patricia Sturdevant –

**NO:**
*Binding Arbitration is the Only Practical Solution to Many Consumer Disputes*

– Dwight Golann

**YES** Mandatory binding arbitration imposed by a business entity on a consumer should have no place in our justice system. Arbitration as a method of resolving disputes is a creature of contract premised on the ability of parties of equal power to choose what method of resolving disputes will best serve their mutual needs. Free choice is the foundation of all alternative dispute mechanisms, including arbitration. Unilateral imposition of

those alternatives raises troublesome issues for consumer advocates because of the potential for abuse by institutional interests and the consequent denial to consumers of access to the courts and to justice.

The essence of arbitration is that it is consensual. The Federal Arbitration Act does not express any preference for arbitration, but simply for enforcing privately negotiated agreements to arbitrate, like other contracts, according to their terms. The purpose of the Act was to enable merchants who had negotiated arbitration agreements to enforce those agreements. It was never intended to force parties to arbitrate disputes they had not agreed to submit to that forum.

Because the consequences of arbitration are severe, consent should never be uninformed or implied. Even arbitral decisions that are wrong as a matter of fact or law and result in a manifest injustice cannot be overturned on appeal. (See, for example, *Moncharch v. Heily & Blase*, 832 P.2d 899 (Cal. 1992).) The rationale for tolerating the possibility of an unfair or incorrect resolution of a dispute is that parties who have made the bargain to arbitrate, knowing a decision is final and binding, should be held to it. But this rationale is wholly inapplicable when, as in most consumer contracts, there is no actual agreement to arbitrate. No system of resolving disputes can be considered fair if it exposes the parties to manifest injustice without their consent. Nor does a system of speedy, economical injustice solve the problem of court overcrowding in a socially acceptable way.

Arbitration works best in resolving disputes of a factual nature between parties who desire to continue an existing

business relationship and who have willingly agreed to submit their disputes to arbitration. Proponents of pre-dispute arbitration clauses in consumer contracts often obscure the crucial distinction between voluntary arbitration, which can be extremely useful, and mandatory arbitration, which is a contradiction in terms, like minor surgery. Proponents of these clauses also ignore the fact that the purposes of such arbitration clauses are to avoid jury trials and to minimize the institution's exposure for high compensatory and punitive damage awards. Yet, because it is constitutionally guaranteed, the right to trial by jury can only be waived voluntarily with an awareness of the existence of the right and the consequences of giving it up. Pre-dispute arbitration clauses in contracts that are not negotiated seldom meet those standards.

Twice recently the California Court of Appeals has refused to enforce arbitration clauses in adhesion contracts on the grounds that such clauses are outside the reasonable expectations of consumers. In *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563 (Ct. App. 1993), the court found that an arbitration clause that was not pointed out to the borrowers by the lender constituted an unfair surprise, and that arbitration in a distant forum was beyond the borrowers' reasonable expectations. The court concluded that the clause was unconscionable because the proceedings were costly, the rules for obtaining a local forum were incomprehensible, and the process seemed designed to discourage borrowers from obtaining a hearing. And in *Bell v. Congress Mortgage Co.*, 30 Cal. Rptr. 2d 205 (Ct. App. 1994), the court considered the entire context of the transaction: the disparity in bargaining strength between the parties, the borrowers'

relative lack of sophistication, the absence of negotiation, the obscuring of the arbitration provision in voluminous text and in the midst of a recitation of rights secured to the borrowers, and the lender's failure to point out the clause. The court held that under this combination of circumstances "an adhesion contract must elicit a clear and informed waiver" of the right to trial by jury, and that the contract in question had not done so.

These judicially imposed limits on enforceability recognize the reality that non-negotiated, non-consensual pre-dispute clauses between parties of unequal power are potentially abusive. Federal law on unconscionability also limits the enforceability of pre-dispute clauses that are outside the reasonable expectations of the weaker party, or are procedurally and substantively unconscionable.

Businesses can reduce their litigation expenses and better serve their shareholders' and customers' interests in a variety of fair and legitimate ways. They can describe the various alternative dispute mechanisms available and allow consumers to elect one or none at the time a dispute arises. Or they can require arbitration by contract, but allow a consumer dissatisfied with the result the option of litigation. Either of these alternatives would reduce costs and speed dispute resolution while providing safeguards against abuse and unfairness.

Alternative dispute resolution mechanisms can serve a useful and important purpose when the parties agree to them. But to create both the appearance and reality of fairness and justice, arbitration, like sex, must be based on consent, not on coercion.

*Patricia Sturdevant is a partner with the firm of Sturdevant & Sturdevant, in San Francisco, California.*

**NO** If all consumers had access to a skilled, tenacious advocate like Pat Sturdevant and a jury available to hear their case, it would be harder to argue for pre-dispute arbitration clauses. In the real world, however, consumers usually don't have either. So well written ADR clauses make sense, both for businesses and their customers.

Corporations often write arbitration clauses into consumer contracts to avoid high litigation costs, inexpert judges, and, let's be candid, juries. Although some companies are concerned about the attitudes of jurors, what many businesses say they fear most is their unpredictability. A few companies also seem to be attempting to create an improper "home-field advantage" by specifying inaccessible venues, little-known ADR administrators, and the like.

The fact that the pre-dispute arbitration clauses may be good for businesses, however, does not necessarily mean that they are bad for consumers. Let me tell you about my heat pump. What's a heat pump? It's an engineering marvel that both heats and cools a room by pulling heat out of the air. Like many other innovations, heat pumps seem to work better in California than in the frigid air of New England. Ours died, was resuscitated at great expense, and died again. The unit was still under an implied warranty, but the manufacturer refused to fix it.

I have a breach of warranty claim worth about $3,000, as well as statutory legal rights. *But how can I enforce them?* I can't go to small claims court with this claim: it's

twice the jurisdictional limit. I could sue in district court and have a jury trial for breach of warranty (although not for violation of Massachusetts' "little FTC" act). But to get a trial I need a lawyer, and no one will take a $3,000 case on contingency. Even if they did, our local court has a year's backlog, which only begins to run after discovery is completed. Thus, a decision is at least two years away, assuming no appeals are taken.

Things look almost as bad for the pump manufacturer. Its lawyer's fee will probably exceed my claim, so it might agree to settle. But it hasn't yet, and as the plaintiff I have to move first. In these circumstances most consumers, neither knowing their rights nor being able to enforce them, simply "lump it." Compared to these bleak options, a quick, cheap, and final system of contractual arbitration looks very attractive.

There are, of course, much bigger consumer claims, such as cases involving new-car lemons and mortgage violations. But even these grievances usually don't involve large sums of money per claimant. And as the size of the claim increases, so do the complexities and individual variations. I recently asked a nationally known advocate for the poor why more mortgage class actions aren't being brought. "We get calls from class-action lawyers," she said, "but they usually want 'cookie cutter' cases." In other words, they want the kind in which essentially identical claims can be litigated or settled en masse. I would too if I were a plaintiffs' lawyer, but this approach automatically rules out most cases that involve individualized facts – like misleading mortgage pitches and my broker heat pump.

***Reforming the Litigation System.*** One solution would be court reform: raising small claims limits, adding judges, and the like. Most of us are not patient or hopeful enough to wait for this. Another might be the system Pat Sturdevant advocates, where litigants negotiate over arbitration after the claim arises and the issues are known. If arbitration offered a fair solution to both sides, litigants would presumably choose it voluntarily.

But this assumes that the consumer has pursued his or her case and found a lawyer who understands arbitration, an unlikely event in my experience. Also, once a claim is filed, the defendant usually hires an outside litigator, and national companies often engage local counsel. As more than one corporate general counsel has complained, litigators often come up with endless reasons why a case has to remain in the court system. Although they may suspect that they are being milked for fees, corporate counsel often feel that they must defer to the litigator's knowledge of the local legal culture. For all these reasons, once a case enters the judicial system, it rarely gets out, even when arbitration would make sense for everyone.

***Making Arbitration Work for Consumers.*** This said, there are serious problems with some of the form arbitration clauses being used today. The question is how to make arbitration work for both sides in consumer transactions. I don't think consumers can realistically be expected to bargain for themselves or will have lawyers to represent them. Thus, legislation will be needed. And since the Federal Arbitration Act has been held to preempt most state laws governing arbitration, the solution must come from the federal government. Examples of the kind of

legislation I have in mind are the Magnuson-Moss Warranty Act, which imposed minimum federal standards on consumer warranties, and the Federal Trade Commission's Credit Practices Rule, which outlawed several unfair collection remedies in consumer contracts.

What should such legislation or regulations cover? It's hard to specify a "one size fits all" system, but among the key provisions should be the following:

*Guarantees of neutrality.* Arbitration administrators and neutrals should meet minimum requirements for independence from litigants; they should not depend for more than a minor portion of their revenue on any single customer.

*Compliance with law.* Consumer arbitrators should be obligated to apply the extensive body of consumer legislation that has been adopted over the past generation, not simply their personal ideas of fairness.

*Venue.* Arbitration should take place where the transaction occurred.

*Fees.* Administrative fees for consumers should be comparable to those imposed by courts; businesses that want to arbitrate should bear the extra cost of doing so.

*Graduated discovery.* Consumers need streamlined discovery, in proportion to the amount at stake in the case.

*Reasoned opinions and appeals.* Parties need not have broad rights of appeal except perhaps in the largest cases, but arbitrators should provide a summary of their reasoning, as an internal check on their performance.

*Ability to grant relief.* Arbitrators are sometimes referred claims, such as class actions, that they are incapable of administering, and sometimes receive requests for relief, such as for punitive damages, that they may have no legal power to grant. A claim should not go to arbitration unless the arbitrator can administer it and has the authority to grant the relief available from a court.

***Conclusion.*** With these reforms, some businesses may no longer be interested in using arbitration clauses. But with such protections, a pre-dispute commitment to arbitrate can be a good deal for everyone.

*Dwight Golann is Professor of Law at Suffolk University Law School, in Boston Massachusetts. He is an active mediator and serves as Chair of the Consumer Financial Services Committee of the ABA's Section of Business Law.*

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**NEWS**

Peter Magnani
(415) 953-2418

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## BANK OF AMERICA ADOPTS ALTERNATIVE DISPUTE RESOLUTION

SAN FRANCISCO, June 2, 1992 – Bank of America has modified all of its deposit and Bankcard account contracts to provide for alternative methods of resolving legal claims arising from complaints by customers. The move is expected to provide customers a means of resolving disputes with the bank that is faster, less costly, and more reliable than litigation, while enabling the bank to manage the costs of resolving customer complaints more effectively.

Beginning immediately, if a customer files a lawsuit against the bank, either party can elect to have the matter resolved through binding arbitration under the rules of the American Arbitration Association. The Association then appoints an arbitrator – usually a practicing attorney – from a list that is acceptable to both parties. The arbitrator conducts an informal hearing and renders a decision, which is binding on both parties.

"The great majority of customer complaints are resolved quickly and routinely, often with a simple telephone call," said Winslow Christian, Senior Vice President and Director of Litigation at Bank of America. "But occasionally, we are unable to resolve a dispute satisfactorily and the customer feels that the only available recourse is to file a lawsuit. This is an expensive and time

consuming effort for us and our customers. We believe that alternative dispute resolution will be a preferable option in most cases."

Christian said that a dispute which might take months to litigate, can be settled in a matter of weeks by binding arbitration. "Customers can have their legitimate grievances addressed without having to pay the high court costs and attorneys fees associated with litigation and the bank tends to be less exposed to unpredictably high damage awards."

Christian, a former California appellate court judge and advocate of alternative dispute resolution, said that organizations that have used binding arbitration have found that claimants tend to be more likely to be awarded compensation from binding arbitration than from litigation, but less likely to be awarded amounts significantly in excess of the actual damages they claim to have suffered. He said that binding arbitration has been used extensively by medical practitioners, construction companies and stock brokers, but is relatively new for banks. Banks of America began including binding arbitration in its commercial loan contracts four years ago, Christian said.

In addition to binding arbitration for individual complaints, Bank of America has instituted a procedure known as "judicial reference" for complaints made as class actions. Judicial reference is a long-standing, but seldom-used alternative dispute resolution procedure. If either party elects judicial reference in a class action, the judge refers the matter to a referee selected in the same way as for binding arbitration. After hearing the case, the

referee submits his decision to the trial judge, who is required to make it his judgment. After that, the normal judicial appeal process ensues.

"Judicial reference provides the same cost-saving and time-saving benefits for customers as binding arbitration, but it is also appealable, which we think is appropriate for class action complaints, since they are more likely to be complex and precedent-setting," Christian said.

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

*NORTHERN CALIFORNIA*

REPORT *Volume 3 No.1*

*NOVEMBER '93*

## *Mandatory Arbitration and Access to Justice*

IN the March 1993 issue of the *ABTL Report*, Bank of America's Assistant General Counsel Arne D. Wagner defends the Bank's recent attempt to impose an alternative dispute resolution (ADR) requirement on its customers. It is reasonable to anticipate that other banks will follow suit. Wells Fargo Bank has already done so. This development bodes ill for consumers' ability to enforce their rights and safeguards under consumer protection statutes and would make equal access to justice dependent upon financial resources.

Bank ADR clauses typically mandate arbitration of individual disputes and judicial references for class actions and private attorney general cases that challenge business practices and seek relief for all affected customers. Such clauses attempt to deprive bank customers of access to the courts, particularly in class actions, and insulate banks against large jury verdicts. In the words of the architect of the Bank of America's ADR plan, Winslow Christian, this change will make the Bank "less exposed to unpredictably high damage awards." The purpose of these clauses plainly is to alter the rules governing dispute resolution to favor banks.

The advantages of arbitration and reference which Mr. Wagner enumerates may provide sound reasons why parties of equal bargaining power might choose to agree to resolve their disputes in the arbitral forum. Like sex, arbitration is fine between consenting adults. Imposing arbitration and judicial reference on unwilling consumers in order to reduce bank exposure is, however, unjust. Bank ADR clauses coerce parties of unequal bargaining strength into a forum which is perceived to be more hospitable to the financial institution.

The notion of mandating arbitration should have no place in our justice system. Arbitration as a method of resolving disputes is a creature of contract premised on the ability of parties of equal power to choose what method of resolving disputes will best serve their mutual needs. Arbitration arose in the context of labor relations, where unions and management negotiated a way of rapidly resolving disputes before a highly skilled labor arbitrator who is trusted by both sides in order to avoid strikes and labor unrest that jeopardized the pecuniary interests of both parties and the societal interest in industrial stabilization.

Thereafter, the use of arbitration to resolve disputes expanded. It was frequently negotiated at arm's length in commercial contracts between experienced and sophisticated business entities who desired to continue their business relationships. Part of those negotiations typically included a choice of which law would govern transactions between entities in different states or countries. In this commercial context, parties should be able to freely negotiate arbitration agreements in the expectation that they will be enforced. Requiring arbitration in the bank-

consumer context, however, distorts the process and raises serious issues of fairness.

The essence of arbitration is that it is consensual. The Federal Arbitration Act does not express any preference for arbitration, but simply for enforcing privately negotiated agreements to arbitrate, like any other contract, according to their terms. The consequences of arbitration are severe: even decisions that are wrong as a matter of fact or law and result in a manifest injustice cannot be overturned on appeal. *See Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992), and Code of Civil Procedure § 1280, *et seq.* The rationale for tolerating the possibility of an unfair or incorrect resolution is that parties who bargained to arbitrate should be held to it. This rationale requires a knowing consent to arbitrate. No system of resolving disputes can be considered fair if it can expose parties to manifest injustice without their knowing consent.

The Bank of America's method of communicating this change in contract terms is unlikely even to inform consumers, and does not seek (or obtain) their express consent. The Bank's notice of change of terms states:

> CHANGE OF TERMS NOTICE FOR BANKAMERICARD VISA, MASTERCARD, VISA GOLD, GOLD MASTERCARD, AND APOLLO ACCOUNTS
>
> Dispute Resolution – If you or we request, any controversy with us will be decided either by arbitration or reference. Controversies involving one account, or two or more accounts with at least one common owner, will be decided by arbitration under the Commercial Arbitration

> Rules of the American Arbitration Association. All other controversies will be decided by a reference under California Code of Civil Procedure § 638 and related sections. A reference who is an active attorney or retired judge will be appointed by the court after selection by the American Arbitration Association using its procedures for selecting arbitrators. The arbitration or reference will take the place of a trial before a judge and jury. (This is a new provision for Cardmember and Apollo Account Agreements. If you continue to use your account, this new provision will apply to all past and future transactions.)

The notice was inserted as a "stuffer" in the monthly statement to credit card holders and checking account customers. It is highly questionable whether customers even read such notices, which are included with other material such as a newsletter from the Bank and solicitations to purchase luggage, insurance and other goods or services.

Moreover, the notice does not say it is a contract and does not look like the Bank's standardized cardholder agreement. It has none of the indicia of a valid and binding contract. There is no manifestation of assent by consumers to be bound to these new terms. Instead, consumers are deemed to have consented to the arbitration and reference requirements if they use their credit cards. But continuing to make charges on a credit card cannot reasonably be construed to indicate assent to arbitration or judicial reference. Nor is this purported new contract term supported by consideration. There is no benefit conferred upon the cardholder, nor any detriment

suffered by the Bank. Instead, cardholders are being deprived by the Bank of substantial rights to unimpeded discovery, trial by judge or jury, and a court system funded by the taxpayers while getting nothing in return.

Finally, the terms of this new contract provision are not fully described. Nothing informs the Bank's customers that arbitration and reference will be costly or that discovery will be limited. Only those who obtain and read the rules of the American Arbitration Association will learn these important facts. Nor does the Bank explain that, as it interprets the ADR requirement, a referee's decision will automatically become the trial court's judgment. Only if the Bank's consumer customers happen to read a newspaper article that quoted Mr. Christian's press release of June 2, 1992, would they learn that the Bank construes its ADR clause to deny any judicial oversight of a referee's decision. Nor will consumers understand that case law specifies that arbitral decisions will be final and binding even if they are based on a misrepresentation of fact, apply the law incorrectly, or are unfair. Under these circumstances, no real agreement to arbitrate exists.

Even if there were a contract it would be adhesionary and unconscionable and therefore unenforceable. The ADR term is procedurally unconscionable because it is contained in a standardized form insert that is not negotiated but simply imposed by the party with greater bargaining power on a take-it-or-leave-it basis. Such a provision is not within the reasonable expectation of the consumer party. Moreover, the failure to describe many important features and consequences of arbitration and reference means that these will come as an unpleasant

surprise to consumers only after a dispute has arisen. Consumers who do not know what they are losing will have no reason to consider moving their accounts to banks that do not require arbitration and reference of disputes, even if they were financially able to do so. Moreover, particularly in today's economy, not every consumer is able to pay off existing balances or obtain credit elsewhere without doing so.

The arbitration and reference provisions are also substantively unconscionable because they deprive consumers of constitutionally guaranteed rights. Article 6, §§ 21 and 22 of the California Constitution vest the judicial power in duly appointed or elected judges and limit the functions of commissioners and referees to "subordinate judicial duties." Consistent with this constitutional mandate, the case law uniformly holds that consent of the parties is required before cases may be decided by persons other than judges. Without such consent, as numerous cases hold, the findings of commissioners or referees are advisory only. In *In Re Edgar M.*, 14 Cal.3d 727 (1975), the Supreme Court held that the adjudication of a juvenile court matter by a referee acting without any procedures for judicial review and without the parties' consent violates the constitutional limitation of a referee to "subordinate judicial duties." *Id.* at 735.

In *In Re Horton*, 54 Cal.3d 82 (1991), the Supreme Court again confirmed that the jurisdiction of a court commissioner, or any other temporary judge, to try cases depends on the parties' stipulation. Since the judicial power of the state is vested in the courts, a judgment entered by a court commissioner without a proper stipulation would be void.

In order to meet constitutional muster, a referee's decision, in the absence of a stipulation, must be advisory only and subject to judicial review. *The People v. Perrone C.*, 26 Cal.3d 49 (1979); *In Re John H.*, 21 Cal.3d 18 (1978). Therefore, the bank's attempt to make an arbitrator's or referee's findings "the judgment of the court" without the opportunity for a rehearing by a judge is an unconstitutional delegation of the judicial power.

These constitutional requirements are also reflected in the statutory scheme governing reference. Code of Civil Procedure § 638 requires a written stipulation for any reference. The case law consistently requires the written affirmation of both parties before a reference is permitted. *See e.g., In Re Hart's Estate,* 11 Cal.2d 89 (1938); *Fooshe v. Sunshine,* 96 Cal.App.2d 336 (1950).

Without consent, the reference of specific issues must be advisory only and the referee's decision becomes effective only after approval by the court. *Holt v. Kelly,* 20 Cal.3d 560 (1978). In *Bird v. Superior Court,* 112 Cal.App.3d 543 (1980), a reference exceeded statutory authority where the petitioner had not consented to reference, the issues referred were not those encompassed in Code of Civil Procedure § 639, and the referee's determination was not advisory only. *Accord, International Jet Ski Boating v. Superior Court,* 232 Cal.App.3d 112 (1991). Indeed, § 638 has been held to be constitutional specifically because the referee's report may be accepted or rejected by the court. *Sandoval v. Salazar,* 57 Cal.App. 756 (1922).

Finally, the constitutional guarantees of due process and equal protection contained in Article 1, § 7A also

require that the findings of a referee or other non-judicial officer be advisory only. *The People v. Perron C., supra. In the Matter of Gregory M.*, 68 Cal.App.3d 1085 (1977), held that due process and equal protection require a judge to review a referee's determinations, *Hebert v. Harn,* 133 Cal.App.3d 465 (1982), ruled that the statutory scheme for judicial arbitration, in order to be constitutional, required a right to *de novo* trial, by court or jury, as to law and facts. If judicial arbitration requires these constitutional safeguards, then non-judicial and non-consensual arbitration and reference must require no less.

Arbitration is particularly inadequate for resolving disputes about bank conduct because the typical arbitration clause seeks to avoid any discovery. Under California law, the right to discovery is deemed to be incorporated in agreements to arbitrate only for personal injury or wrongful death claims. In all other disputes, discovery is available only if the arbitration agreement expressly so provides. Since the typical bank ADR clause does not provide for discovery, banks would have to make available only those documents they intend to offer in support of their own claim. This would deprive consumers challenging the legality of bank charges of the evidence they need to prove their claims.

The substantive unconscionability of bank ADR clauses is exacerbated because it would greatly increase expense to consumers. Arbitration is inordinately expensive. The filing fees are $300 for a claim up to $25,000 (more than four times the $74 filing fee for Municipal Court) and $500 for a claim of $25,000 to $50,000 (almost three times the $182 fee for Superior Court). The maximum fee is $4,000 for a claim in excess of $5,000,000. If no

amount can be stated, the filing fee is $1,000, subject to adjustment. If injunctive relief is sought, the fee may be any sum deemed "appropriate" by AAA. In cases involving more than two parties, an additional 10% of the administrative fee is due for each additional party. The parties must also pay fees for processing the case: $150 per party for the first 180 days and $150 per party for every 90 days thereafter that the case is pending; $100 per day for each party for hearings, for postponing hearings, and for renting hearing rooms. In addition, the parties must compensate arbitrators. Requiring these substantial fees in order to challenge bank practices is particularly egregious because cardholders, as taxpayers, have already paid for the court systems so which banks would deny them access. They often cannot afford to pay a second time in order to challenge the bank's acts or practices.

Even if discovery is available in referenced disputes, it is still unconscionable to deprive consumers of access to the courts, which are established and supported by the state to afford forums for the rich and poor alike to present controversies at minimal cost to the litigants. Instead, a class of bank customers seeking to challenge unlawful conduct would be forced to bear the burden and expense of paying referees to handle law and motion issues, discovery disputes, and trial. Particularly in class actions and unlawful business practices cases, costs of reference could be many times more than litigation in court.

Bank ADR clauses would effectively insulate wrongful practices from any effective challenge. They would deprive customers of their constitutional rights without

their knowledge or consent and subject them to the risk of speedy injustice. Alternative dispute resolution mechanisms can serve a useful and important purpose where the parties agree to them, but to afford both the appearance and reality of fairness and justice, they must be based on consent, not on coercion.

*Ms. Sturdevant is a partner in the firm of Sturdevant & Sturdevant.*

❑

III

NATIONAL

ARBITRATION

FORUM

Monday, October 20, 1997

The Supreme Court has cleared the way and major American companies are moving all of their contracts to an arbitration basis as fast as possible. There is no reason for your clients to be exposed to the costs and risks of the jury system.

But all arbitration systems are not the same!

At the National Arbitration Forum:

Every issue is resolved according to the law!
Every decision is made by a legal professional!
Every award is limited to the amount claimed!
Every claim is decided on its own merits!

I have enclosed our complimentary Legal Memorandum, Arbitration & Class Actions in Financing. If we can answer more questions, give us a call at 800/474-2371!

Sincerely,

/s/ Edward C. Anderson, Esq.
Edward C. Anderson, Esq.
ECA:mkm

Enc

**Legal Memorandum**

**DATE:** October 1, 1997

**TO:**

**FROM:** Forum Counsel

**SUBJECT:** Arbitration & Class Actions in Financing

**CONCLUSION:** *Forum* Arbitrations may *not* be consolidated into class actions unless all parties consent.

**AUTHORITIES:** *Champ v. Siegel Trading Company*, 55 F.3d 269 (7th Cir. 1995); *Gammaro v. Thorp Discount*, 828 F. Supp. 673 (D. Minn. 1993)

In the court system, financing transactions are always at risk for Class Action treatment. Rule 23 of the Federal Rules of Civil Procedure (and the state equivalents) provides that claims will be consolidated if:

1. There are *common* questions of law or fact; and,
2. The claims of the "representative" are *typical* of those of the purported members of the class.

Most often, the claims of class action plaintiffs' lawyers are based on printed or computer-generated documents or standard procedure manuals, which leave little room to argue against "commonality" and "typicality". Even when "fraud" claims are made, which sometimes are more "personal", lenders run the risk that some court will find the requisite standard.

Faced with this reality, even spurious "class" claims will frequently be settled, since the costs and risks (even when discounted for probability) are so extreme that defense cannot be economically justified. Numerous commentators have argued that these cases are among the most prominent examples of abuse of the court system, but no change in these standards seems likely in the near term.

Since California banks began using arbitration in financing transactions in 1985, attention has been focused on the interplay between arbitration procedures and "class action" type consolidation of claims. In these and other cases, plaintiffs' lawyers have argued that, although a case will be decided outside the court system, Rule 23 standards should be applied to the "bundling" of claims. Defendants, for the most part, have resisted. Accordingly, the courts have addressed the issue in a variety of circumstances.

## PRE-*SOUTHLAND* OPINIONS

Prior to the application of the Federal Arbitration Act to virtually all arbitration agreements by the U.S. Supreme Court (see opinions *Southland v. Keating*, 465 U.S. 1 (1985) through *Allied-Bruce Terminex v. Dobson*, 115 S.Ct. 834, (1995)), some courts relied on the express language of the parties to the contract, the arbitration rules, *or* state law to allow "consolidation" or "joinder" of multiple parties into a single arbitration. The leading case in this regard is *Compania Espanola de Petroleos v. Nereus Shipping*, 527 F.2d 966 (2d Cir. 1975). Although procedurally complex, this case stood for the proposition that, absent language or arbitration rules to the contrary, under state law, the court

had the authority to have the arbitrator(s) decide the claims of multiple parties, over the objection of one or more of the parties.

However, even prior to the "federalization" of arbitration law, the majority of federal courts had declined to adopt that standard. These courts held that, in cases in which the Federal Arbitration Act applied, the courts' authority was restricted to that granted by Section 4 of the Act. The court could only enforce the agreement of the parties, as reflected by the language of the agreement or the agreed rules of arbitration. *Weyerhauser v. Western Seas Shipping*, 743 F.2d 835 (9th Cir. 1984), cert. denied, 469 U.S. 1061 (1984); *Del Webb Construction v. Richardson*, 823 F.2d 145 (5th Cir. 1987); *Baesler v. Continental Grain*, 900 F. 2d 1193 (8th Cir. 1990). Unless the arbitration rules provided for class treatment, there would be no class action.

## "FEDERALIZATION" OF ARBITRATION LAW

Beginning in 1985, the U.S. Supreme court began to hear a series of cases which, when resolved, would "federalize" the law regarding all arbitration agreements. In the first of these opinions, *Southland v. Keating, supra*, the court, for the first time, prohibited state legislatures, courts and regulators from applying higher standards to arbitration agreements than those applied to any other contract term, in a group of opinions culminating with the *Terminex* case, the court changed the law of arbitration to make it clear that the Federal Arbitration Act controlled almost all arbitrations.

These cases involved nearly every kind of agreement and every type of arbitration clause, including the consumer

contracts litigated in *Terminex*. The Supreme Court regularly expanded the reach of FAA authority to the full breadth of the Commerce clause. This result was reiterated in 1998, in *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652 (1995); where, after the Montana Supreme Court attempted to create a narrow exception to the blanket rule created by the Supreme Court, the Court held that arbitration agreements were always enforceable, except on the grounds that apply to all contract terms, such as fraud or unconscionability.

## CLASS CLAIMS UNDER THE FAA

After the Supreme Court effectively applied the Federal Act to all arbitrations, few attempts have been made to claim "class" status for arbitrable claims. Those that have been asserted have been soundly rejected. Courts have addressed the issues squarely and have held that, where the arbitration rules did not specifically provide for arbitration on a class basis, under the FAA, the court may not order it. *Champ v. Siegel Trading Company*, 55 F.3d 269 (7th Cir. 1995); *Gammaro v. Thorp Discount*, 828 F. Supp. 673 (D. Minn. 1993); *McCarthy v. Providential Corp.* 1994 WL 387852 (N.D. Cal. 1994). Of note, *Gammaro* (app. dismissed, 15 F.3d 93 [8th Cir. 1994]), involved a consumer lending document which incorporated the Code of the National Arbitration Forum. Although the claims were both "common" and "typical", Forum Rule 19A was held to prohibit "class" treatment.

Courts have specifically held that signers of a mandatory arbitration agreement are excluded from a class action by

similarly situated plaintiffs (who had not signed the arbitration agreement). *Collins v. Int'l Dairy Queen, Inc.*, 169 F.R.D. 690 (M.D. Ga. 1997). Similarly, where claimed class members had signed an agreement to arbitrate, the class action would be enjoined and individual arbitrations would be ordered. *Doctors Associates v. Hollingsworth*, 949 F.Supp. 77 (D. Conn. 1996).

The current status of the law is that the FAA covers all but the most unusual arbitration agreements. Under the FAA, the courts' authority to consolidate claims in any way is severely limited and always limited by the arbitration rules.

Therefore:

> If the parties provide for "class" treatment, by agreement or by arbitration rules, the court will order such a procedure;
>
> If the rules prohibit such treatment, as the Forum Code does, the courts will *not* order "class" treatment:
>
> If the rules are silent, as are the AAA rules and others, the result could vary from state to state or Circuit to Circuit.

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DECLARATION CONCERNING
DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY
BY INDIVIDUAL DEBTOR

(NOT APPLICABLE)

---

DECLARATION UNDER PENALTY OF PERJURY
ON BEHALF OF CORPORATION OR PARTNERSHIP

I, the Secretary of the corporation / partnership named as debtor in this case, declare under penalty of perjury that I have read the following summary and schedules, consisting of 15 sheets plus the summary page, and that they are true and correct to the beast of my knowledge, information, and belief.

Date 1/5/94 Signature /s/ Edward C. Anderson
Edward C. Anderson
Secretary

---

Penalty for making a false statement or concealing property. Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. § 152 and 3571.

None

[ ] d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the two years immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS DATE ISSUED

Norwest Bank Minnesota, N.A.

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18. INVENTORIES

None
[X] a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

---

None
[X] b. List the name and address of the person having possession of the records of each of the two inventories reported in 18a., above.

---

19. Current Partners, Officers, Directors and Shareholders

None
[X] a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

---

None
[ ] b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting securities of the corporation.

| NAME AND ADDRESS | TITLE | NATURE AND PERCENTAGE OF STOCK OWNERSHIP |
|---|---|---|
| Edward C. Anderson | Director, officer, shareholder | 4,500 shares |
| Roger S. Haydock | Director, shareholder | 1,000 shares |
| Stephen P. Doyle | Director, office, shareholder | 4,500 shares |

---

20. Former partners, officers, directors and shareholders

None

[X] a. If the debtor is a partnership, list each member who withdrew from the partnership within one year immediately preceding the commencement of this case.

---

None

[ ] b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within one year immediately preceding the commencement of this case.

| NAME AND ADDRESS | TITLE | DATE OF TERMINATION |
|---|---|---|
| Roger S. Haydock resigned as officer | Officer | 11/1/93 |

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UNITED STATES BANKRUPTCY COURT

District of Minnesota

In re: EQUILAW, INCORPORATED 41/1601581

Case No. ___

Chapter 7

List of Equity Security Holders

| REGISTERED NAME OF HOLDER OF SECURITY LAST KNOWN ADDRESS OR PLACE OF BUSINESS | CLASS OF SECURITY | NUMBER REGISTERED | KIND OF INTEREST REGISTERER |
|---|---|---|---|
| Edward C. Anderson | | 4,500 | Shareholder |
| Roger A. Haydock | | 1,000 | Shareholder |
| Stephen Doyle | | 4,500 | Shareholder |

[1]STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

ITT Commercial Finance Corp.,

Plaintiff,

vs. Court File No. MX 92-3469

Wangerin, Inc., Ervin Wangerin, individually, and Sharon Wangerin,

Defendants.

**********

DEPOSITION OF
EDWARD CHARLES ANDERSON, JR.

**********

DATE TAKEN: 06/01/94 REPORTED BY: CINDY M. TRATTLES

* * *

[12] a '73.

Q And what is your present occupation?

A I'm the president of Pan Am Systems.

Q And how long have you been president of Pan Am Systems?

A Three years.

Q And when did that start, month and year?

A Early '91. I'm sorry I don't know the month.

Q And have you retained this position of president throughout that term?

A Yes.

Q Through today's date?

A Yes.

Q And who was your employer previous to that employment?

A ITT Consumer Financial Corporation.

Q And how long were you employed with them, what time period?

A About 1986 or '85 until the beginning of '91.

Q When you say beginning of 1991, is that when you went over to Pan Am?

A Yeah.

Q There was no gap period in there with another employer?

A No.

Q And what was your position with ITT Consumer Financial Corporation?

A Assistant general counsel.

Q Was that the same position you held throughout the time

* * *

[19] I referred to ITT's attorney had a conversation with Mr. Anderson's attorney, it was Ms. Gabrielle Hils; correct?

MS. HILS: Correct.

Q (By Mr. Hoverson) Going back to my earlier question, Mr. Anderson, when did you first become aware of National Arbitration Forum?

A Middle 1980's.

Q And how was it that you became aware of the National Arbitration Forum?

A Our office was conducting a nation-wide search for ADR providers. They were one of a dozen or so that were contacted.

Q Could you tell me what you mean by ADR?

A Alternative dispute resolution.

Q And when you say your office, do you mean ITT Commercial Finance or ITT Consumer?

A The general counsel's office of Consumer Financial Corporation.

Q And what were the circumstances that you first became aware of Equilaw, Inc.?

A The same way.

Q Could you describe for me the relationship between Equilaw, Inc., and National Arbitration Forum?

A National Arbitration Forum is a wholly-owned subsidiary of Equilaw, Incorporated. They're both corporations.

* * *

RAND/RP-327

**Does ADR Really Save Money? The Jury's Still Out**

Deborah R. Hensler

**Reprinted from *The National Law Journal***

## Does ADR Really Save Money? The Jury's Still Out

**For those who hope ADR can reduce costs, the research is proving somewhat disappointing.**

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By Deborah R. Hensler
SPECIAL TO THE NATIONAL LAW JOURNAL

FACED WITH INCREASING caseloads and decreasing resources for handling their civil calendars, courts around the country look to alternative dispute resolution programs to reduce the public costs of civil case disposition. In the private sector, corporate counsel look to such programs to reduce their legal bills. But what's the evidence that ADR programs actually achieve cost savings for taxpayers and litigants? Ask a researcher who has been studying these programs and the answer may be "mixed," "ambiguous" or simply "not available."

The issue is not whether individual litigants can achieve cost savings by using ADR in specific disputes – the answer to that question is almost certainly yes. Rather, the question is whether courts or litigants can achieve aggregate cost savings – reductions that show up on the bottom line – by substituting ADR for litigation in large classes of disputes. The answer to this question is still largely unknown.

The most conclusive evidence on the effect of ADR on costs comes from studies of mandatory court-administered non-binding arbitration. These programs, which had been adopted by at least half the nation's state trial court systems, as well as a handful of federal districts, by the end of the 1980s,[1] have been subjected to numerous detailed studies by researchers at many institutions. The results many researchers have come up with are somewhat disappointing to those who had hoped such programs would reduce the public and private costs of civil case disposition.

**Few Cases Diverted**

Briefly, researchers have found that in most jurisdictions that adopt court-administered arbitration, too few cases are diverted from trial – the single most costly court "event" in the course of civil litigation – to balance the public costs of implementing an arbitration program.[2]

The problem is not that individual arbitration hearings are themselves very costly, or that very many parties reject the non-binding arbitration award and proceed to

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[1] S. Kellitz, G. Galls and R. Hanson, "State Adoption of Alternative Dispute Resolution: Where Is It Today?" 12 State Court J. 4 (1988).

[2] These studies have been conducted in state trial court jurisdictions in California, Colorado, Hawaii, New Jersey, North Carolina and Pennsylvania and in 10 federal district courts. For summaries of research results, see D. Hensler, "Court-Ordered Arbitration: An Alternative View." 1990 U. Chl. Leg. Forum 399 (1990), and R. MacCoun, E. Lind and T. Tyler, "Alternative Dispute Resolution in Trial and Appellate Courts." In Handbook of Psychology and the Law (1992).

trial. The typical hearing costs the court just a fraction of what it would cost to mount a trial, and in most jurisdictions only a tiny fraction of the cases that enter the arbitration program insist on a judge or jury trial.

But because these programs typically are put in place in jurisdictions in which only a small fraction of civil cases would go to trial absent arbitration, there is not much room for further reduction in the trial rate. Conversely, with so many cases in these jurisdictions poised to forgo trial – whether because of costs, delay or some other reason – a large pool of litigants and attorneys see in the arbitration program their only real opportunity to have their cases heard before a neutral third party.

In a number of studies,[3] researchers have found that once arbitration is put in place, cases that previously would have settled without any court intervention, or would even have been dropped without being formally joined, remain on the court calendar, only to settle just before or just after the arbitration hearing. As a result, court-annexed arbitration programs operate more as enhancements to the settlement process than as trial-diversion procedures. And the aggregate costs to the court of providing arbitration hearings to thousands of cases may off-set any public cost savings from reductions in the trial caseload.[4]

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[3] See, e.g., R. MacCoun, "Unintended Consequences of Court Arbitration: A Cautionary Tale From New Jersey," 14 Justice System J. 229 (1991), and E. Lind, "Arbitrating High Stakes Cases: An Evaluation of Court-Annexed Arbitration in a U.S. District Court" (1990).

[4] See, e.g., D. Hensler and E. Rolph, "Judicial Arbitration in California: The First Year" (1981).

Moreover, court-administered arbitration programs have had mixed success in reducing litigants' costs for legal fees and expenses. Probably because court-arbitrated cases usually do not proceed to trial, empirical data does not provide much support for opponents' claims that such programs will increase legal costs by adding another layer of procedure.

But research has shown that court-administered arbitration often does not reduce legal fees much either, unless the program rules operate to change the pretrial process in a significant fashion – for example, by strictly limiting discovery. Without such ancillary changes, whatever effects arbitration may have on lawyers' activities don't make much of a dent on the lawyers' bills.[5]

**Interpreting the Findings**

Two important lessons, with applicability beyond the court-administered arbitration context, emerge from these research findings.

First, inserting any new procedure in the litigation process – a process characterized by a combination of routinized "standard operating procedures" and complex strategic decision-making – is likely to produce unanticipated outcomes. Not only does the new procedure change the rules regarding a particular stage of the litigation process; it also changes myriad decisions made by the parties and their representatives, from the moment

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[5] See, e.g., R. MacCoun, "Unintended Consequences," and E. Lind, Arbitrating High Stakes Cases, supra, note 3.

they first consider filing a lawsuit through their final decision to resolve the dispute.

Court-administered arbitration proponents were seeking a low-cost means of diverting cases from trial. To their surprise, they created a quasi-adjudicative system that is so popular that it diverts cases from settlement – and commands enough support in the legal community that in many jurisdictions it is deemed worth implementing whether or not it reduces court costs.

Second, despite widespread concern about costs in the legal community and widespread acceptance of the "law and economics" model of settlement behavior – which asserts that parties will reach settlement whenever costs of proceeding to trial exceed the difference between the plaintiff's demand and the defendant's offer – litigants' and attorneys' disputing behavior are influenced by non-economic as well as economic factors.

Research on court-administered arbitration suggests that lay litigants – and many experienced litigants as well – place a value on having their cases heard that goes beyond whatever impact such a hearing might have on the ultimate monetary decision.[6] And, as every practitioner knows, many cases involve non-monetary, as well as monetary, stakes.

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[6] E. Lind, R. MacCoun, P. Ebener, W. Felstiner, D. Hensler, J. Resnik and T. Tyler. "In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System," 24 Law & Society Rev. 953 (1990).

**Studies on Family Mediation**

Family law mediation programs also have been the subject of extensive empirical research. The researchers' findings regarding the cost consequences of these programs parallel the findings for court-administered arbitration.[7]

Courts generally have been found to realize little cost savings from these programs, for three reasons. First, they require parties to appear in court before or after mediation. Second, mediation may encourage parties to review and revise child custody agreements over time, necessitating additional mediation hearings. Finally, properly implemented mediation programs require additional expenditures to pay trained mediators and program administrators.

The evidence of private cost savings is stronger for family law mediation than for court-administered arbitration; most researchers report some significant savings. But in this context, as with arbitration, there is some evidence that billing practices may dilute the impact that mediation might otherwise have on legal fees charged to clients.[8]

Much less is known about the cost consequences of other court-administered ADR programs – from the oldest of such programs, judicial settlement conferences, to

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[7] This research is summarized in J. Pearson, "Family Mediation," A Working Paper Prepared for the National Symposium on Court-Connected Dispute Resolution Research, Oct. 1993.

[8] Id.

the newest methods, early neutral evaluation, mandatory mediation of civil damage suits and summary jury trials.

There are few systematic studies of judicial settlement programs or summary jury trials. And no recent studies apply the comparative analytic design that is necessary to determine whether there is a difference, in costs or other outcomes, between resolving cases with or without such procedures in place. Analyses of early neutral evaluation and mandatory mediation of civil damage suits are ongoing, but have yet to produce conclusions relative to cost savings.

**True Cost Impact**

Logically, court-sponsored and privately initiated ADR programs can reduce the costs of civil litigation in three ways: by reducing the number of claims brought, thereby reducing the total court costs to process cases and the aggregate payouts by defendants; by reducing the expected value of claims – that is, the probability of a plaintiff victory multiplied by the average payout for successful claims; and by reducing legal fees and other transaction costs.

Court-instituted programs are directed only at the transaction-cost dimension. To obtain support for mandating the use of ADR in cases that are brought before them, many courts implicitly strive to design programs that will not change the pattern of outcomes in these cases. Nor are most court ADR programs intended to reduce the number of cases filed – although some, such as medical malpractice screening panels, are intended to eliminate

"frivolous" lawsuits. Indeed, if court ADR programs succeed in reducing transaction costs for civil cases – either directly, by providing lower-cost mechanisms for disposition or indirectly, by reducing congestion of the trial calendar – they may well induce increased filings.

Privately initiated programs, however, may have among their objectives reducing average payouts and thereby reducing claims filing. For example, in jurisdictions that bar the award of punitive damages in private binding arbitration, adopting arbitration limits the value of certain classes of cases, which may in turn make these cases less attractive to plaintiffs' attorneys. Similarly, substituting an expert arbitrator for a lay jury might be viewed as a means of reducing the value of certain claims, with questionable liability but high damages.

There is little systematic evidence of such types of cost reductions resulting from the institution of private ADR agreements. But a recent RAND Institute for Civil Justice study of the introduction of ADR in the banking industry found that the number of lender-liability claims against several major banks dropped dramatically after these banks instituted private binding arbitration.[9]

### Claims Encouraged?

Conversely, private ADR programs, like their public counterparts, may increase the total costs of disputing if they encourage claims filing by providing a relatively low-cost means of dispute resolution.

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[9] E. Moller, E. Rolph and P. Ebener, "Private Dispute Resolution in the Banking Industry" (RAND 1993).

For example, studies of medical malpractice reform[10] have found that the inception of medical malpractice arbitration in certain states was accompanied by a rise in the total number of malpractice claims brought against health care providers. Although the average payout for all medical malpractice claims declined with the advent of these programs, the aggregate payout for malpractice claims increased, suggesting that arbitration encouraged the filing of meritorious smaller-value claims that individuals could not economically pursue in the trial system.[11]

Analyzing the effects of privately initiated ADR on parties' total costs is complicated by the potential for ADR to change parties' filing strategies. Analyzing private ADR's effects on transactions costs alone should be a simpler matter, but that research remains to be done.

It is clear that providers' fees to dispose of cases far exceed the typical court filing fee, particularly when commercial cases are involved.[12] The increasing enthusiasm in the business community for substituting private ADR for litigation suggests that parties believe the economic benefits of ADR outweigh these additional costs. But for parties who contemplate adopting or extending their use of private ADR, it would be useful if systematic evidence were available about the cost impact of using specific

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[10] See, e.g., P. Danzon, "New Evidence on the Frequency and Severity of Medical Malpractice Claims" (RAND 1986).

[11] Id.

[12] See R. Reuben, "The Dark Side of ADR." Calif. Lawyer 53 (Feb. 1994).

ADR procedures – arbitration, mediation, mini-trials and so on – for different types of disputes.

In the long run, whether public or private ADR programs achieve the promise of cost savings they hold out to courts and litigants will probably depend not so much on differences between which ADR approach is chosen or which entity provides the service but rather on how much they change patterns of disputing and lawyering. Parties who use litigation as an aggressive business tactic and lawyers who engage in excessive practices as a means of increasing their legal fees will find ways of pursuing their objectives through ADR procedures.

The evidence to date, although fragmentary and inconclusive, strongly suggests that ADR is not a magic bullet for reducing costs. ADR procedures may, however, provide a means of achieving such cost reductions for parties and attorneys who share that objective.

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*Dr. Hensler is director of the Institute for Civil Justice at the Rand Corp. in Santa Monica, Calif., and professor of law and social science at the University of Southern California Law Center.*

III

NATIONAL ARBITRATION FORUM

January 14, 1999

Robert S. Banks, Jr.
KOIN Center, Suite 1450; 222 S.W. Columbia
Portland, OR 97201

Dear Robert:

A number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements eliminates class actions and ensures that credit-related lawsuits will be directed to arbitration, not a jury trial.

*All arbitration is not the same.* The Forum is one of the two largest arbitration providers in the country for a reason.

- The forum is nationwide, with arbitrators in every federal judicial district.
- Forum arbitrators make decisions based on the law – not "equity" like some other arbitration providers. At a minimum, they have more than 15 years of legal experience and have arbitrated commercial, financial, and business disputes.
- The Forum's fees are reasonably priced to be accessible to consumers and businesses alike, making it the only system that truly works in consumer disputes.

*We have a number of information resources on arbitration law and how arbitration will make a positive impact on the bottom*

*line.* Contact Leslee Nelson at 800-474-2371 for a free information packet.

Regards,

/s/ C. Brown
Curtis D. Brown
V.P. and General Counsel

CDB/lkf

Enclosure

[The Washington Post]

**BUSINESS**

WEDNESDAY, MARCH 1, 2000

## *Win Some, Lose Rarely?*

## *Arbitration Forum's Rulings Called One-Sided*

*By* CAROLINE E. MAYER
*Washington Post Staff Writer*

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Like many banks car dealers and retailers, First USA N.A., the nation's second-largest issuer of credit cards, no longer permits its customers to sue it in court. Instead, any disputes must be resolved through arbitration by a firm chosen by First USA.

Businesses such a First USA say that for everyone involved, arbitratior is faster, more efficient and cheaper than litigation. But arbitration may also mean that the company wins most of the time – at least according to data recently submitted in a lawsuit in an Alabama state court.

The data, disclosed last month by First USA in a class-action lawsuit challenging mandatory arbitration, show that not only had the company sought arbitration far more often than consumers, it has also won in 99.6 percent of the cases that went all the way to an arbitrator.

First USA's experience in the two years since it imposed its arbitration requirement is likely to become a focal point in the debate over the arbitration rules contained in many consumer contracts. Arbitration has for

years been a means to resolve disputes between businesses, but increasingly companies are including arbitration clauses in consumer agreements and employment contracts. In First USA's case, consumers were notified by a fine-print insert in their monthly bills that by using their cards, they agreed to take disputes to arbitration.

Dozens of lawsuits around the country are contesting the arbitration rules, with mixed results. At least three of these suits also question the impartiality of the arbitration firm selected by First USA and many other credit-card firms and retailers, such as American Express and Best Buy.

These suits contend that the firm, the National Arbitration Forum, is so financially dependent on the banking industry that it can seldom afford to rule against companies. Furthermore, they say the forum's own marketing materials, promising a "positive impact on the bottom line," suggest that the organization is inherently biased against consumers.

A spokesman for Bank One, which owns First USA, declined to discuss the suits, saying the company doesn't comment on pending litigation.

Edward Anderson, managing director of the forum, dismissed the allegations in the lawsuits, saying, "We are impartial, and more importantly our arbitrators – former judges, lawyers and law professors – are impartial." Anderson said the lawsuits "are merely an attempt by trial lawyers to find a way to avoid arbitration" so they can continue to collect high fees in big class-action court cases. In arbitration, high lawyer fees are unlikely

because almost all involve individual claims for relatively small amounts.

The controversy over arbitration will get attention today in Congress. The Senate Judiciary subcommittee on administrative oversight and the courts will hold a hearing on the growing number of contracts that require employees, businesses and consumers to agree, in advance of any disputes, to give up their rights to sue and submit all future disputes to arbitration.

Subcommittee Chairman Charles E. Grassley (R-Iowa) said he is a proponent of arbitration as a means of unclogging the courts. But he said he wants to "make suer consumer interests are protected in the process and that the arbitration is being conducted in a fair way."

Rep. Luis V. Gutierrez (D-Ill.) introduced a bill in the House last year that would bar mandatory-arbitration provisions in consumer contracts, and Sen. Russell Feingold (D-Wis.) plans to introduce similar legislation. He tried to attach such a provision to the bankruptcy legislation recently passed by the Senate, but he dropped the attempt in exchange for the subcommittee hearing.

Since First USA implemented its arbitration clause in early 1998, it has filed 51,622 claims against consumers with the forum. In the cases that First USA filed, the forum has made 19,705 awards. First USA prevailed in 19,618, card members in 87. (Of the remaining cases, First USA said more than 28,000 had "expired" because the customers had not been notified in a timely fashion as is required by the forum's rules. More than 3,600 cases are still pending.)

Meanwhile, only four consumers have filed cases against First USA with the forum. In two of these four cases, the arbitrators made awards against First USA; one case was settled, and another is still pending.

The fact that the company sends cases to arbitration far more often than consumers is a function of economics, say consumers' lawyers. It costs $49 to file a complaint with the forum, an amount that may be reasonable to big businesses trying to collect large unpaid debts. But for a consumer challenging late fees of about $29 or high interest rates, the filing fee may not be worthwhile. In the past, these consumers might have joined a class-action suit to fight the companies. Costs for such suits are minimal because most lawyers take them on a contingency basis.

While Bank One spokesman Thomas Kelly declined to talk about the lawsuits, he said "the overwhelming majority" of cases that First USA filed at the forum "are claims against customers who are more than six months delinquent" in paying their bills.

To the forum's Anderson, the figures are meaningless because First USA would probably have had a similar success rate had it pursued the same cases in court. Anderson said creditors win about 98 percent of collection actions brought against debtors in federal courts. While declining to discuss the specific numbers provided by First USA, saying they were confidential, Anderson said "expired" cases should be counted as victories for consumers.

As companies have adopted these clauses, business has grown for the forum, a private firm where 20,000

cases were filed last year, up from 16,000 the year before, according to Anderson. It is the second-largest arbitration firm in the country, behind the nonprofit American Arbitration Association, which handled more than 140,000 cases last year. Officials at the American Arbitration Association said almost all of those were commercial cases that didn't involve consumers. In contrast, arbitration industry experts say, the forum's business involves more corporate-consumer disputes, in large part because of the company's aggressive marketing.

The forum's marketing letters are an issue in at least three lawsuits that question its impartiality. In one letter, Anderson wrote: "There is no reason for your clients to be exposed to the costs and risks of the jury system."

Another letter urged lawyers to contact the forum to see "how arbitration will make a positive impact on the bottom line."

A coalition of public interest groups that includes the Trial Lawyers for Public Justice, AARP, the National Association of Consumer Advocates and the Association of Trial Lawyers argues that these letters suggest that the forum will take the companies' side.

"If a court were to solicit business from a party that might come before it with strong hints that the solicited party would get a good deal in her or his courtroom, there is no doubt that this would be improper and sanctionable behavior," the group said in a friend-of-the-court brief filed in a case challenging First USA's arbitration clauses.

Anderson said the letters simply state the law and economics of arbitration. "The letters say you save money through arbitration, and that's true – all parties save money. . . . There's nothing secret about the way we market. We market to everybody – to attorneys general, consumer protection administrators, anybody who will listen," he said.

Britton D. Monts, a Dallas Lawyer who has filed a class-action suit against First USA in a federal court in Texas alleging improper late fees, said evidence collected in his lawsuit shows that "virtually all" of the forum's income comes from First USA collection fees, making its business vital to the future of the company.

Anderson said that is a "complete fabrication" and "there's no evidence that it's true." He declined to disclose specific financial data, saying the forum was a privately held company. The company did submit its financial records to the federal court in Dallas, after a court order, but on the condition that they be kept confidential.

First USA papers filed in the Dallas case show that the company paid the forum $5.3 million between January 1998 and November 1999. "Without question, loss of First USA's business would result in a major financial blow to [the forum] and is the kind of loss [the forum] would necessarily have to avoid," Monts said. "The idea of a private court being financially dependent on a litigant appearing before it is an insult to the integrity of our justice system."

Alan Kaplinsky, a Philadelphia lawyer who represents several financial institutions and is a strong advocate of mandatory-arbitration clauses, said such charges are unfair. "The forum has put together an extensive list of experienced, highly reputable arbitrators," he said. "To suggest that the forum would basically become partial because of the First USA fees impugns the integrity of their arbitrators."

**ADRO**
**adrworld.com**

## EC Says ADR for E-Commerce Disputes Should Not Be Compulsory

June 21, 2000
*By Tony Kreindler, ADRWorld.com*

The use of online alternative disputes resolution systems by e-commerce companies to settle complaints over transactions should not preclude consumers from exercising their right to go to court, according to comments filed by the European Commission with the U.S. Federal Trade Commission on June 19.

According to the EC, the use of any "exhaustion principles" – requirements for a consumer to exhaust all ADR remedies before being allowed to start a court action – could lead to protracted disputes and undermine consumer confidence in dispute resolution systems. "In addition, in many jurisdictions such compulsion would be viewed as unfair," the EC said in its comments. "By producing an agreement that gives with one hand and takes away from another is unlikely to fill a consumer with confidence."

The EC filed its comments in response to a recent workshop sponsored by the FTC and Department of Commerce to explore the use of online ADR mechanisms to foster consumer confidence in e-commerce by providing a more efficient and cost-effective way to settle disputes. The agencies, as well as business representatives and consumer advocates, hope that online ADR mechanisms can solve the jurisdictional problems and complexities of resolving disputes over cross-border transactions through

traditional legal channels. One issue that was discussed at the workshop and that remains a subject of debate is whether consumers and businesses should be bound to use ADR systems if a dispute arises.

According to the EC's comments, "Existing legal frameworks ensure a legal safety net which will underpin consumer confidence in shopping on-line cross-border," and the reassurances provided by those frameworks are particularly important to e-commerce because it is still in the embryonic stage. "But ADR and legal redress are two separate issues," the EC said, and access to legal redress "should not be made conditional on the use or even the exhaustion of the possibilities of the former." The EC added that an effective and fair ADR system that gives consumers confidence will be used without the need for compulsion.

**Role of Government**

In its comments, the EC reiterated its long-standing position that public authorities should not develop ADR systems or codes of conduct themselves, but instead pursue a partnership with all stakeholders. "Industry should be encouraged not just to develop ADRs in isolation, but to create a package of measures including the trustmarks and codes of conduct," the EC said, and public authorities "must act as honest brokers in this process allowing standards to be established by consensus through the exchange and development of these stakeholders experience. The EC added that it has just begun such a "co-

regulation" process to address the need for general principles covering codes of conduct and accreditation, as well as principles for mediation and conciliation.

The EC also reiterated its position that a recognizable seal or trustmark for e-tailers who adhere to a code of conduct "will play an important role" by providing consumers with a reference point and serving as an effective tool for enforcement. Codes of conduct should encourage a market environment that rewards best business practices, and they should include effective monitoring, sanctions and consumer complaint mechanisms.

*The FTC and Commerce Department are accepting public comment on the use of online ADR for consumer disputes until June 29. For more information and full text of comments received visit www.ecommerce.gov/adr on the World Wide Web.*

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